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Supreme Court, U.S.
FILED

No. 08-1178 MAR 19 2009

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IN THE

Supreme Court of the United States

DONNA REID, as Personal Representative of the Estate of JONATHAN MERLINO, deceased, and HELEN KEARNS, as Personal Representative of the Estate of ERIC SCOTT KEARNS, deceased,

Petitioners,

v.

NEW HAMPSHIRE INDEMNITY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eleventh Circuit affirmed the District's Court's Summary Judgment entered in favor of Respondent, New Hampshire Indemnity Company ("NHIC").

This case arises out of a one vehicle accident that occurred on January 5, 2000, in Flagler County, Florida. In that accident, 20 year old Eric Scott Kearns and 19 year old Jonathan Merlino were killed. A judgment was entered against the driver, Jeffrey B. Anderson, Jr. in state court for $6,500,000.00 for the deaths of these two young men. NHIC subsequently filed an action for declaratory judgment to determine whether Anderson Jr. was an insured under a NHIC policy issued to Anderson Jr.'s parents. The District Court ruled as a matter of law that Jeffrey Bruce Anderson, Jr. was not insured under the NHIC policy because he was not a "resident" of his parents' "household" for purposed of coverage as a "family member".

Two questions are presented:

1. Was Summary Judgment properly granted and affirmed pursuant to Fed.R.Civ.P. 56 when the record was replete with facts that should have been presented to a jury, where there were facts presented from which a fair-minded jury could return a verdict for Petitioners.

2. Whether the Court below failed to afford "full faith and credit" to the prior ruling of the decisions made by the Appellate Courts of the State of Florida, where Florida law governed the issues in the case. 28 U.S.C. section 1652. United States Constitution, Article 4 Section 1.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not reported, but is attached in the Appendix. (App. A) The opinion of the United States District Court, Middle District of Florida Jacksonville Division, is reported at 2007 WL 473677 (M.D. Fla.). (App. B)

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the decision of the District Court was handed down on September 19, 2008. A timely petition for rehearing was filed on October 9, 2008. The Petition for Rehearing was denied on December 19, 2008. (App. C) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Fed. R. Civ. P. 56(c):

> The Judgment sought should be rendered if the pleadings, the discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movement is entitled to judgment as a matter of law.

United States Constitution, Article 4 Section 1:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceeding of every other state. And the Congress may by general laws prescribe the manner in which those acts, records, and proceeds shall be proved and the effect thereof.

28 U.S.C. § 1652 (State laws as rules of decision):

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

This case arises out of a motor vehicle accident that occurred on January 5, 2000 in Flagler County, Florida, (hereinafter "the accident"). Jeffrey Bruce Anderson, Jr. (hereinafter "Anderson Jr.") was operating a motor vehicle wherein 19 year old Jonathan Merlino and 20 year old Eric Scott Kearns were passengers. In a one vehicle accident, Eric Kearns and Jonathan Merlino were killed.

A lawsuit was originally filed in Flagler County, Florida for wrongful death. The lawsuit was brought by the young mens' mothers, Donna Reid, as personal representative of the estate of Jonathan Merlino,

deceased (hereinafter "Donna Reid") and Helen Kearns, as personal representative of the estate of Eric Scott Kearns, deceased (hereinafter "Helen Kearns") against Anderson Jr. and Juan Quiles (hereinafter "Quiles"). Quiles owned the motor vehicle driven by Anderson Jr. at the time of the accident, and was sued pursuant to Florida's dangerous instrumentality doctrine.

New Hampshire Indemnity Company (hereinafter "NHIC") was notified of the claim. NHIC elected not to provide a defense to any party. Thereafter, judgment was entered in favor of Donna Reid and Helen Kearn against Anderson Jr. and Quiles in the amount of $6,500,000.00.

After entry of judgment, NHIC filed an action for Declaratory Judgment in the United States District Court, Middle District of Florida, Jacksonville Division. Jurisdiction was predicated upon diversity of citizenship, 28 U.S.C. § 1332. NHIC sought a determination from the District Court as to whether the tortfeasor, Anderson Jr., was covered under the NHIC policy that was issued to Anderson Jr's parents, Christine Anderson and Jeffrey Anderson Sr. The District Court granted Summary Judgment in favor of NHIC, finding that there was no coverage.

The United States Court of Appeals of the Eleventh Circuit Affirmed the District Court's decision.

The sole issue in the case is whether Anderson Jr. qualified as a "family member" as used in the NHIC policy. The NHIC policy's definition of a family member is: "a person related to you by blood, marriage, or adoption who is a resident of your household."

Procedurally, the district court entered summary judgment pursuant to FRCP 56. A judgment should not be entered pursuant to Rule 56 "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial - whether, in other words, there are any genuine factual issues that properly can be resolved only by finder of fact because they may reasonably be resolved in favor of either party." *Id.*

Taking the facts most favorable to Donna Reid and Helen Kearns, the Anderson family moved to Palm Coast, Florida in 1991. Anderson Jr. lived with his parents at their house free of charge at 87 Belvedere in Palm Coast, Florida from 1991 to April 1999.[1]

There was no question but that reasonable juries could find that Anderson Jr. was a resident of his parents household at least until April 1999.[2]

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1. There was evidence that Anderson Jr. lived briefly with relatives in Massachusetts in 1998. Taking facts the most favorable to the non-moving party, that brief excursion to Massachusetts was about two months. There also was testimony that Anderson Jr. lived briefly in a trailer in 1997 that he allegedly bought for $2,500.00. Anderson Jr., however, received that money as part of a settlement for his father's medical malpractice case, so it represents compensation for Anderson Jr.'s loss of his father's services. Moreover, the Department of Motor Vehicles have no record of Anderson Jr. ever buying a trailer.

2. The Eleventh Circuit's order denying the appeal in fact focused on Anderson Jr.'s status after he moved into the duplex.

In April 1999, Anderson Jr. moved into 25B Braddock Lane, Palm Coast, Florida. 25B Braddock Lane was a duplex owned by Anderson Jr.'s parents. It was 9/10's of a mile away from the parents house at 87 Belvedere Lane.

Anderson Jr. had two roommates. Anderson Jr. and each roommate should have paid $200.00 per month for a total of $600.00 for rent. Anderson Jr. testified that his payment of rent to his parents was dependant upon his employment situation.

Taking the facts most favorable to the non-moving party, Anderson Jr. was unemployed almost the entire time that he lived in 25B Braddock Lane, from April 1999 through the January 2000 accident.[3]

Accordingly, a reasonable jury could conclude that Anderson Jr. lived at his parents' duplex for free the entire time he was there. The evidence is undisputed that Anderson Jr.'s parents never threatened to evict him for nonpayment of rent, but rather told him to "straighten up" his life.

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3. Anderson Jr. testified that he was paid full-time employment wages from the time that he moved into 25B Braddock through July 1999 by Top Of The Line Concrete. Top Of The Line Concrete's representative signed an affidavit saying that he had only worked for them for a few days. His tax return for 1999 only showed income of $3,407.01. Anderson Jr.'s roommate, Juan Quiles, moved into 25B Braddock in September 1999, and he testified that to his knowledge Anderson Jr. only worked two days leading up to the accident. His other roommate, Danny Dosantos, testified that Anderson Jr. never worked after an injury that Anderson Jr. sustained in May until the accident.

Anderson Jr. testified that he was a typical 21-22 year old. If he mades $200.00, he would normally spend it on the weekend, then would have to borrow money after he had spent it.

The 25B Braddock duplex therefore was available to the Anderson family members as a place to stay for free.

Not only did Anderson Jr.'s parents provide him with a free place to live, but they also gave him between $10.00 and $20.00 per week. This money was for necessaries like food, and there was no expectation that the money would ever be repaid.

The record also showed evidence of a close relationship between Anderson Jr. and his parents' residence at 87 Belvedere. Donna Reid was at the 87 Belvedere address at least four times a week in the relevant time frame, and she indicated that Anderson Jr. was there 90% of the time. He made free use of the entire house, including using the swimming pool, kitchen, watching television, or otherwise just "hanging around". He kept a basket of old toys at the house. He contributed to his parents' household by performing work at 87 Belvedere, such as lawn maintenance, cleaning the pool, etc. He drove his mother's van. He could enter and exit 87 Belvedere at any time he wanted.[4]

Christine Anderson performed Anderson Jr.'s laundry. The ambulance report for Anderson Jr. before

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4. Although the testimony is mixed as to whether he had a key, the testimony was that his father was always home due to a stroke, so Anderson Jr. had free access to the home.

the subject motor vehicle accident in January 2000 references 87 Belvedere as the home address. There were occasions where Anderson Jr. spent the night at 87 Belvedere.

After the subject motor vehicle accident, Anderson Jr. moved back into his parents' house at 87 Belvedere. Again taking evidence most favorable to the non-moving party, Anderson Jr. stayed at 87 Belvedere at least through May 2000.

Moreover, Anderson Jr. was arrested in September 1999 for distribution of methamphetamine. His mother posted a $10,000.00 bond for his release.

Federal jurisdiction in the District Court was established by diversity of citizenship. The District Court, as well of the Eleventh Circuit Court of Appeal, were required to decide the case based on state law. 28 U.S.C. § 1652.

Under Florida Law, ambiguities are interpreted liberally in favor of the insured and strictly against the insurer that prepared the policy. *Travelers Indemnity Company v. OCR Incorporated*, 889 So.2d 779 (Fla. 2004). Where policy language is subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer. *State Farm Fire and Casualty v. CTC Development Corporation*, 720 So.2d 1072 (Fla. 1998).

The term "household" is not definied in the NHIC policy, and therefore must be construed broadly and liberally.

There are several appellate decisions in the State of Florida addressing sufficiency of evidence for whether a relative is considered a member of the insured's "household" for insurance purposes. The law is well settled in Florida that a resident need not reside at the same physical address as the insured:

> Although this definition of household might seem to require living together in a single dwelling, it has been recognized by the policy term "household" may also be defined to include one who is not, at the time of the accident, physically living within the same structure as the named insured. *Row v. United Services Automobile Association*, 474 So.2d 348 (Fla. 1st DCA, 1985).

The term "household" focuses more on the concept of a family unit, rather than a physical address. "Resident of your household" includes a "variety of family arrangements which extend beyond the physical parameters of the house." "Household includes numerous family members of a poor family who are continually transient and mutually dependant." *Alava v. Allstate Insurance Company*, 497 So.2d 1286 (Fla. 3rd DCA, 1986), citing *USF&G v. Williams*, 375 So.2d 328 (Fla. 1st DCA, 1979).

One case that was cited heavily below was the *Row* decision, *supra*. Mark Row lived in an apartment owned by Row's father. The apartment that Row lived in was a unit that was separate from where his father lived, although they did both live in the same apartment complex.

Just like Anderson Jr., Row did not pay rent to his father. Row's and Anderson Jr.'s parents essentially supported them. Also, Row spent a great deal of time at his father's apartment, and would often eat there, do his laundry there, socialize, etc. These facts have a great deal of parallel with Anderson Jr.'s living arrangements with his parents.

In *Row*, the trail court heard testimony and ruled *as a trier of fact* that Row was not a member of his father's household for purposes of coverage. The Fifth District Court of Appeal for the State of Florida reversed this decision with instruction to enter judgment as a matter of law in favor of Row, finding coverage.

The Appellate Court therefore found that the facts were so strong that, as a matter of law, Row was to be considered a member of his father's household.

By contrast, the District Court found in the above captioned matter that there is not even enough evidence in Anderson Jr.'s case to present the facts to a jury. The appellate court affirmed.

In *General Guarantee Insurance v. Broxsie*, 239 So.2d 595 (Fla. 1st DCA, 1970), plaintiff claimed coverage under her aunt's policy. Her aunt live in Monticello, Florida, while plaintiff attended school, in Thomasville, Georgia. Plaintiff lived for about a year before the subject accident in a rented room in Thomasville, Georgia. Broxsie testified that upon graduation it was her intention of accepting employment in Thomasville and not to return to live with her aunt. The trial Court ruled as a matter of law under these undisputed facts that Broxsie was still a resident of a aunt's household.

In *Patterson v. Cincinnati Insurance Company*, 564 So.2d 1149 (Fla. 1st DCA, 1990), Melissa Patterson was injured while riding a bicycle. She resided at an apartment in Fort Lauderdale rented by her father. Her father was not living at the apartment at the time of the accident, but was rather living in Gulf Breeze. The record evidence was that her father had lived at the apartment in Fort Lauderdale, but was not at the time of the accident. The court ruled under those circumstances that there was an issue of fact for the jury as to whether Melissa was a member of her father's household.

> Although case law demonstrates that it is not essential that the insured and the person claiming under the insured's policy actually live within the same structure, when the evidence may point in either direction, as in the case at bar, then it is for the trier of fact to decide the residency issue, not the court.

Patterson, at 3. (Other citations omitted.)

In *State Farm Mutual Auto Insurance v. Johnson*, 536 So.2d 1089 (Fla. 5th DCA), Russell Johnson was involved in a motor vehicle accident. He sought coverage under his father's State Farm policy. At the time of the accident, Russell Johnson resided at 529 Putnam Road, which he occupied with a one-year lease. Previously, he had lived with his parents on Lytal Court. After moving into Putnam Road, he continued to receive his mail at his parents' house, received his messages there, had a key to his parents' house, and had free reign of the parents' home. The jury found in favor of coverage, and

the District Court of Appeal upheld a judgment in favor of coverage based on that verdict.

In *Johnson*, the injured party actually had a lease at an entirely different residence than his parents'. The reasonable reading of the *State Farm v. Johnson* opinion is that Russell's one-year lease was with someone other than his parents. The opinion also does not say anywhere that his parents paid for his rent, at least creating an inference that Russell Johnson paid his own rent.

By contrast, Anderson Jr. did not have a lease with his parents. He was living at 25B Braddock for free. With no written lease, he could leave any time he wanted. This was hardly the normal landlord-tenant relationship.

In *Southerland v. Glens Falls Insurance*, 493 So.2d 87 (Fla. 4th DCA, 1986), the insureds' son had moved into his own apartment. His mother, however, paid his rent prior to the accident. The record evidence was that Southerland spent as much time with his parents as at his own apartment. The court held that Southerland was "testing the waters", and felt that there was sufficient evidence for a jury to find coverage.

In the case before this Court, Anderson Jr. did not move into an apartment owned by a stranger with a lease. Rather, he moved into a house owned by his parents where he received support and was relieved of responsibility of paying for rent.

REASONS FOR GRANTING THE PETITION

Under Fed.Rules Civ. Proc. Rule 56, Summary Judgment can only be granted when there is no genuine issue of material fact.

> [I]t is clear enough from recent cases that at the Summary Judgment stage the Judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As (citation omitted) indicate, there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Anderson v. Liberty Lobby Inc*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed. 2d 202 (1986).
>
> The inquiry preformed is the threshold inquiry of determining whether there is the need for a trial— whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. *Id.*
>
> If the defendant in a run of the mill civil case moves for Summary Judgment or for a directed verdict based on the lack of proof of a material fact, the Judge must ask himself not whether he thinks the evidence unmistakenly favors one side or the other but whether a fair mined jury could return a verdict for the plaintiff on the evidence presented. *Id.*

The district court's Summary Judgment and the Eleventh Circuit approval are in conflict with the Court's parameters for summary judgment identified in *Anderson*. The facts of the pending case have many of the factual elements in common with the Appellate Court decisions issued by the Courts of the State of Florida.

For example, Anderson Jr. and Mark Row both lived in physical addresses separate and apart from their parents, but lived in those units without paying any rent, and were basically supported by their parents. In Row, the First District Court of Appeals for Florida reversed a verdict of no coverage, with directions to enter judgment in favor of coverage.

In the case of bar, the District Court and Eleventh Circuit have found the exact opposite, upholding Summary Judgment that there was no coverage on similar facts as were found in *Row*.

The District Court and the Circuit Court of Appeals are both required to follow state law decisions under these circumstances. 28 U.S.C. § 1652.

> Under the *swift* doctrine, Federal Courts assumed the power in diversity suits to decide issues of common law, such as tort principles or the interpretation of contracts. (Citation omitted) *Erie* repudiated this doctrine and held that state decisional law is entitled to respect equal to that accorded to state statutes. (Citations omitted) Neither Congress nor the Federal Judiciary has the Constructional power to declare a substantive rule of common law for the states. *Olympic Sports Products v.*

Universal Athletic Sales, 760 F.2d 910 (9th Cir. 1985, citing *Erie Railroad v. Tomkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188(1938).

The Summary Judgment at Bar so far exceeds Florida law as to depart from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this Court's advisory power. U.S. Supreme Court Rule 10(a). The facts before this Court parallel facts considered in controlling state court decisions, yet the District Court and Eleventh Circuit reach the exact opposite outcome.[5]

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5. The Tenth Circuit Court of Appeals recently summarized the effect of state intermediate appellate courts on U.S. District Courts of Appeals:

> "When the federal courts are called upon to interpret state law, the federal court must look to the rulings of the highest state court, and, if no such rulings exist, must endeavor to predict how that high court would rule." *Johnson v. Riddle*, 305 F.3d 1107, 1118 (10th Cir. 2002). "If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." *Id.* at 1119 quoting *Comm'r of Inter Revenue v. Bosch's Estate*, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967). The decision of an intermediate appellate state court "is datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West Am. Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S. Ct. 179, 85 L. Ed 139 (1940).

Folks v. State Farm Mutual Insurance Company, 299 Fed.Appx. 748, 757 (10th Cir. 2008).

In *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958), Plaintiff brought a personal injury case against Blue Ridge Rural Electric Cooperative. Blue Ridge defended on the bases of workers' compensation immunity, which was controlled by a South Carolina Statute. The immunity turned on whether plaintiff was an employee as defined in the South Carolina Statute.

The trial court initially struck the affirmative defense, finding as a matter of law that plaintiff was not a statutory employee for purposes of South Carolina's Statute.[6]

The Court of Appeals disagreed with the District Court, and held that as a matter of law the plaintiff was an employee of Blue Ridge, and therefore directed that judgment be entered for Rural Electric on the immunity issue.

The United States Supreme Court *took jurisdiction of the matter,* and overruled the trial Court and the Court of Appeals. The Supreme Court noted that the South Carolina standard for employee and immunity have "no particular formula by which to determine whether an owner is a statutory employer. . ."

> (W)hile the language of the statute is plain and unambiguous, there are so many different

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6. Note that the defense was stricken at the end of presenting evidence, which is the equivalent of a directed verdict on that issue. A directed verdict and summary judgment involved the same standard of review. *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 265 (1986).

> factual situations which may arise that no easily applied formula can be laid down for the determination of all cases. In other words, 'it is often a matter of extreme difficulty to decide whether the work in a given case falls within the designations of the statute. It is in each case largely a question of degree in and of fact.' *Byrd*, citing *Smith v. Farmer*, 198 S.C. 91, 97, 15, S.E. 2d 681, 683.

United States Supreme Court therefore reversed the trial Court and the Appellate Court with directions that the matter be tried, and that a jury decide the critical factual issue.

Similarity, the question of whether Anderson Jr. was a member of his parents' "household" is not subject to a simple or easy definition. As referenced in the state appellate decision, it is extremely fact sensitive. The matter therefore should be submitted to a jury.

The Supreme Court of the United States took certiorari of an erroneous decision based on state law in *Magenau v. Aetna Freight Lines*, 360 U.S. 273, 79 S. Ct. 1184, 3 L. Ed. 1224 (1969). This case also involved interpretation of a state workers' comp statute, finding that when the facts were susceptible to a finding for either party, the evidence should have been submitted to a jury in a trial.

Again, the facts in the case at Bar are very similar to Florida decisions where the Appellate Courts have ruled that there are sufficient facts upon which a jury could find coverage. In *Patterson, supra*, Plaintiff lived

in her father's apartment in Fort Lauderdale while her father lived in Golf Breeze. Even though they lived in separate places, there was enough for a jury to decide that Ms. Patterson was a resident of her father's household. Similarly, Anderson Jr. lived for free in his parents' duplex located 9/10th of a mile away from their principal place of residence.

In *State Farm v. Johnson*, *supra*, plaintiff lived in a house that he leased from an unrelated third party, yet still was considered a member of his parents' household because he was at his parents' house on a frequent bases. In this instance, Anderson Jr. lived in a house for free that his parents owned, and also had similar ties to his parents' household.

In *Southerlin v. Glen Falls*, *supra*, the alleged insured lived in an apartment separate from his mother, while his mother paid for his rent. The insured spent a great deal of time at his mother's house. Again, Anderson Jr. lived in a house for free that his parents owned, and yet the Eleventh Circuit Court of Appeals and District Court found that there is no possibility that he could be considered a part of his parents' household.

The Supreme Court of Florida has ruled that when policy language is subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer. *State Farm v. CTC Development*, *supra*. The District Court's decision approved by the Eleventh Circuit Court forces a narrow interpretation on the NHIC policy.

The District Court and Eleventh Circuit Court of Appeals opinion at bar do not merely contradict the state opinions: they contravene the states decisions to the point that they violate the *Erie* Doctrine, and 28 U.S.C. § 1652. It arises to a departure from the accepted and usual course of judicial proceedings as contemplated in U. S. Supreme Court Rule 10(a).

The decisions before the Court also violate the standards expressed by the United States Supreme Court for Rule 56 governing summary judgment. The Supreme Court has taken jurisdiction to correct misapplications of the rules of civil procedure. (*See, e.g., Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964).)

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully request the issuance of a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, and an Order reversing the Summary Judgment below with directions to remand to the District Court for trial by jury.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 19, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-11731

NEW HAMPSHIRE INDEMNITY COMPANY, INC.,

Plaintiff-Counter-
Defendant-Appellee,

v.

DONNA REID, as Personal Representative of the Estate of Jonathan Merlino, deceased, HELEN KEARNS, as Personal Representative of the Estate of Eric Scott Kearns, deceased,

Defendants-Counter-
Claimants-Appellants.

(September 19, 2008)

Before ANDERSON, BARKETT and HILL, Circuit Judges.

PER CURIAM:

After oral argument and careful consideration, we conclude that the judgment of the district court is due to be affirmed. We have carefully reviewed the relevant

Florida case law, and have compared the instant facts against the facts in those cases. We conclude that a reasonable jury would have to conclude under the facts of this case, and in light of the Florida case law, that Anderson, Jr. had moved out of his parents' home and was living apart in the duplex. The fact that he was receiving some financial support from his parents is not alone sufficient to make him a member of the family under the policy and the case law.

AFFIRMED.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION DATED FEBRUARY 7, 2007 AND FILED FEBRUARY 8, 2007

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO.: 3:05-CV-1280-J-12MCR

NEW HAMPSHIRE INDEMNITY COMPANY, INC.,

Plaintiff,

vs.

Donna REID, as Personal Representative of the Estate of Jonathan Merlino, deceased, HELEN KEARNS, as Personal Representative of the Estate of Eric Scott Kearns, deceased, JOHN P. MERLINO, JEFFREY BRUCE ANDERSON, JR., and JUAN QUILES, III,

Defendants.

OPINION AND ORDER

This case comes before the Court on Plaintiff's Motion for Summary Judgment (Doc.72) requesting a determination on its Complaint for Declaratory Relief (Doc.1) that Jeffrey Bruce Anderson, Jr. (Anderson, Jr.) is not an insured under the New Hampshire Indemnity Company, Inc. (NHIC) policy of insurance issued to his

father, Jeffrey B. Anderson, Sr. (Anderson, Sr.), as the named insured. Plaintiff asserts that Anderson, Jr. was not a covered resident member of the household of Anderson, Sr. and his wife (Anderson, Jr.'s mother), Christine Anderson (the Andersons), on January 5, 2000, when he was involved in a fatal car accident.[1] Defendants, Donna Reid (Donna Reid Lunsford) and Helen Kearns, the representatives of the estates of the two young men killed in the accident, filed a memorandum in opposition to the motion for summary judgment (Doc.73). These two Defendants obtained a Final Judgment (Doc.73, Exh.4) against Jeffrey Bruce Anderson, Jr. and Juan Quiles, III, in the amount of $3,000,000.00 each. That Final Judgment also awarded John P. Merlino $500,000.00 against Jeffrey Bruce Anderson, Jr. and Juan Quiles, III. Following oral argument by the parties and after considering the facts, evidence, and law applicable to this matter, the Court will grant Plaintiff's Motion for Summary Judgment for the reasons set forth below.

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue of a material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The burden is on the moving party

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1. The ruling on Plaintiff's Motion for Summary Judgment also resolves the Defendants' Counterclaim contained in Doc. 33, as it seeks a determination by the Court that Anderson, Jr. was a covered resident member of the Andersons' household and therefore insured under the NHIC policy.

to meet the standard set forth in Rule 56(c). *See Celotex Corp. v.. Catrett*, 477 U.S. 317 (1986). In the Eleventh Circuit, summary judgment should only be granted where the moving party has sustained its burden of showing the absence of a genuine issue of material fact when all the evidence is viewed in the light most favorable to the nonmoving party. *See Sweat v. Miller Brewing Co.*, 709 F.2d 665, 656 (11th Cir.1983). An issue of fact is genuine only if a reasonable jury considering the evidence presented could find for the non-moving party. Material facts are those which will affect the outcome of the trial under governing law. "[T]he mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *See Raske v. Dugger*, 819 F.Supp. 1046, 1052 (M.D.Fla.1993) *(citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

NHIC issued a personal automobile policy to Anderson, Sr., with effective dates from April 9, 1999 to April 9, 2000.[2] Part A of the policy provides coverage for the "Insured," defined as "You or any "family member" for the ownership, maintenance or use of any auto or "trailer." The policy defines "family member" as "a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child." The policy does not define the term "resident."

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2. A copy of the policy is attached as an exhibit to Plaintiff's Motion for Summary Judgment (Doc.72) as well as to the Defendants' response (Doc.73).

Appendix B

Plaintiff contends that Anderson, Jr., was not a resident of the Andersons' household at the time of the accident on January 5, 2000, and therefore was not insured under the NHIC policy. Defendants contend that Anderson, Jr. was a resident of both a duplex on Braddock Lane, as well as the Andersons' home on Belvedere Lane, and therefore was insured under the NHIC policy at the time of the accident.

The construction and effect of a written contract are matters of law to be determined by the Court. *See Lazzara Oil Co. v. Columbia Cas. Co.*, 683 F.Supp. 777 (M.D.Fla.,1988). "Ordinary rules of construction require [the Court], first, to assess the natural or plain meaning of the policy language at issue." *Valiant Ins. Co. v. Evonosky*, 864 F.Supp. 1189, 1191 (M.D.Fla.1994)(*quoting Landress Auto Wrecking Co., Inc. v. United States Fidelity & Guaranty Co.*, 696 F.2d 1290, 1292 (11th Cir.1983)). While the NHIC policy at issue in this case does contain a definition of "family member," it does not define "residency" which is required in order for the policy to provide coverage for such family member.

The issue of residency under an insurance policy is typically a factual matter. However, when the facts are essentially undisputed, the Court may determine whether a family member is a resident as required for coverage under the policy. *See State Farm Fire and Casualty Co. v. Nickelson*, 677 So.2d 37, 38 (Fla. 1st DCA 1996); *Kepple v. Aetna Casualty and Surety Co.*, 634 So.2d 220, 221 (Fla. 2nd DCA 1994).

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In *General Guarantee Ins. Co. v. Broxsie*, 239 So.2d 595 (Fla. 1 st DCA 1970), the Court set forth guidelines for determining residency that have been utilized by many courts in the context of automobile insurance coverage. The Court also utilizes the *Broxsie* guidelines in determining whether or not Anderson, Jr. was a resident of the Andersons' household at the time of the fatal accident of January 5, 2000.

In *Broxsie*, the First DCA stated that "[w]hat appears to distinguish a person as a resident or non-resident is that the resident is more than a mere visitor or transient, but lives at a place with additional attachments *of such significance* as to render that person a more or less *consistent part of the community.*" *Broxsie* at 597 (emphasis added). The *Broxsie* court identified three important considerations in determining residency: 1) close ties of kinship; 2) a fixed dwelling unit; and 3) enjoyment of each part of the living facilities. *Id.*.

The *Broxsie* also court noted that the residence of a party is a matter of both fact and intention, so it is important to consider the intent of the parties in making a residency determination. *Id* . (citation omitted). The issue of whether or not a person "lives at a place with no present intention of removing therefrom" is question that must be answered looking at the facts of the particular case. *Id.* (citations omitted). The Broxsie court also observed that the term "resident of the same household" is ambiguous as employed by automobile insurance policies and "should be considered in its most inclusive sense." *Id.* (citation omitted).

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The Court has reviewed all the deposition testimony submitted, including that of Anderson, Jr., Anderson, Sr., and Christine Anderson, as well as the affidavit of Donna Reid Lunsford (Reid Affidavit), and finds that the essential material facts surrounding the issue of residency of Anderson, Jr. at the time of the accident are undisputed.[3] To the extent that facts are disputed, the Court notes them, views them in the light most favorable to the Defendants, and finds that they are not material, in that they would not support a reasonable jury finding in favor of the Defendants. The Court summarizes the facts below.

Anderson, Jr. lived at the Braddock Lane duplex for at least eight months prior to the accident.[4] The duplex and the Andersons' single family home on Belvedere Lane were separate residences on different streets and not a "fixed dwelling unit[5]."

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3. Citations to the record for the undisputed facts can be found in Plaintiff's Motion for Summary Judgment (Doc.72), pp. 5-12.

4. Since approximately age 18, Anderson, Jr. had moved in and out of his parents' home several times before moving to the Braddock duplex in April 1999, and also stayed there after the accident to recuperate from his injuries. Anderson, Jr.'s intent was to live on his own, but various circumstances had him return to live with his parents until he could re-establish his own residence. *See e.g.*, Depo. of Anderson, Jr., at p. 88; Depo. of Christine Anderson, at pp. 29-30.

5. The Court views the term "fixed dwelling unit" in its most inclusive sense, recognizing that, for the purposes of

(Cont'd)

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insurance coverage, Florida court determinations of residency since *Broxsie* have not imposed a hardline rule requiring that the proposed resident actually reside in the same physical dwelling household as the named insureds, that is, Florida courts have found that a person may be a "dual resident" of both the named insured's household and a separate dwelling. However, for the reasons stated in this opinion, the Court finds that the facts in this case are clearly distinguishable from those cases where Florida courts have found residency despite separate dwelling units, and do not support a finding in this case that Anderson, Jr. was a resident of the Andersons' household. *Cf, e.g., Dwelle v. State Farm Mutual Automobile Insurance Company*, 839 So.2d 897 (Fla. 1 st DCA 2003)(at time of accident the named insured's son was a full-time college student, physically residing with his parents at his parents' home at the time of the accident, parents were intended sole source of financial support, son had not abandoned his parents' home, and parents claimed son as a dependant on their tax returns); *Seitlin & Co. v. Phoenix Insurance Co.*, 650 So.2d 624 (Fla. 3rd DCA 1994) (holding son, a full-time student, covered under parents' homeowners policy where son treated parents' home as permanent residence, maintained room and possessions at parents' home, and parents were *sole* financial support.); *Kepple v. Aetna Casualty and Surety Co.*, 634 So.2d 220 (Fla. 2nd DCA 1994) (holding daughter entitled to uninsured motorist coverage as a resident of parents' household where daughter and husband resided in enclosed carport attached to parents' home and had free access to parents' home with no separate utilities, address, or mailbox); *Alava v. Allstate Insurance Co.*, 497 So.2d 1286 (Fla. 3rd DCA 1986) (holding son of divorced parents a resident of both households where son spent significant time in both mother's and father's households and clear intent of parents that son maintain relationship with

(Cont'd)

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Anderson, Jr. shared the Braddock Lane duplex with various roommates. Though there was no written lease, the Andersons, who owned the duplex, charged Anderson, Jr. and his roommates $600 per month for the "B" side of the duplex, where they lived. All utilities were the responsibility of Anderson, Jr. and his roommates. The electric bill was in the name of Anderson, Jr., and Anderson, Jr. was responsible for all of his own personal bills, including utilities and groceries.

The record is disputed about whether Anderson, Jr. consistently paid his full share of the rent. For purposes of ruling on Plaintiff's Motion for Summary Judgment, the Court assumes that Anderson, Jr. sometimes paid his full rental share, sometimes made a partial rental payment, and sometimes did not pay anything toward his share, depending on his employment status. The record is undisputed, however, that he was supposed to be paying rent to his parents to live at the Braddock duplex and that he was never threatened with eviction for any partial or non-payment.

(Cont'd)

both parents); *Row v. United States Automobile Association*, 474 So.2d 348 (Fla. 1 st DCA 1985)(apartment complex owned by father was considered "family dwelling" for mentally ill son and other siblings, even though son slept in a separate apartment where son relied on father for emotional and financial support, son used father's apartment for everything except sleeping so was no mere visitor or transient, and there was no evidence of father's or son's intent at the time of the accident for son's living arrangements to change.).

His parents only occasionally visited Anderson, Jr. at the Braddock Lane duplex. The frequency of Anderson, Jr.'s visits to his parents' home on Belvedere Lane is disputed, ranging from an estimate of several times a week to sometimes no visits for weeks at time. Again, for purposes of ruling on Plaintiff's Motion for Summary Judgment, the Court assumes that a jury could find that Anderson, Jr. visited the Andersons' home several times each week.

At the time of the fatal accident, Anderson, Jr. did not have a key to the Andersons' home, did not have a bedroom at the Andersons' home nor would one have been available for his use, and rarely, if ever, spent the night there.[6] Some of his personal items were stored in boxes in the garage. When he visited his parents' home, Anderson, Jr. was permitted to help himself to the contents of the refrigerator and he sometimes dined there with family members. Despite various conflicting statements, the Court also assumes that a jury could find that while he visited his parents' home, he also watched television, used the swimming pool, and sometimes helped with some chores around the house.

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6. In their response to Plaintiff's Motion for Summary Judgment (Doc.73), the Defendants assert that Donna Reid Lunsford's affidavit supports the fact that Anderson, Jr. sometimes slept in a recreational vehicle that was parked at the Andersons' Belvedere Lane home. The Court finds no such statement in her affidavit. Christine Anderson stated that she was not aware of Anderson, Jr. ever sleeping in the recreational vehicle. Depo. of Christine Anderson at p. 78.

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The deposition testimony of Anderson, Jr., Anderson, Sr., and Christine Anderson regarding their intent as to the residency of Anderson, Jr. is unanimous and uncontroverted in the record. Anderson, Jr. stated that he considered the Braddock Lane duplex his home and that even before moving there he only stayed at his parents' Belvedere Lane home temporarily pending his ability to establish his home elsewhere.[7] *See e.g.* Depo. of Anderson, Jr. at pp. 36, ll 8-10, pp. 71-72 and 88.

When Anderson, Jr. moved into the Braddock Lane duplex in April of 1999, and throughout the course of his residency at the duplex, Anderson, Sr. offered no financial support. Christine Anderson, his mother, sometimes on a weekly basis, would give or loan Anderson, Jr. "ten or twenty bucks here and there." Christine Anderson also never threatened to evict Anderson, Jr. for partial or nonpayment of rent.[8] The Andersons expected Anderson, Jr. to support himself and had no intention of having Anderson, Jr. return to

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7. The Defendants cite as evidence that Anderson, Jr. was a resident of the Andersons' Belvedere Lane address the ambulance report for Anderson, Jr. on the date of the fatal accident which shows Belvedere Lane as his address. Doc. 73, Exh. 9. The Court finds that this document is not probative of Anderson, Jr.'s residency because there is no indication of who provided the information contained in the report. Moreover, the report states that Anderson, Jr. was ejected from his vehicle, sustained multiple injuries, and his verbal ability was "confused."

8. She also provided money to post $10,000 bail when Anderson, Jr. was arrested in September 1999.

their household on a permanent basis.[9] *See e.g.* Depo. of Christine Anderson at pp. 29-30; Depo. of Anderson, Sr. at pp. 11, 24 and 31.

In addition, Anderson, Jr. did not have keys to any of the Andersons' vehicles.[10] Anderson, Sr. did not intend that Anderson, Jr. be insured under the NHIC policy.[11] *See e.g.* Depo. of Christine Anderson at pp. 26 and 28; Depo. of Anderson, Sr. at p. 23. When Anderson, Jr. moved into the Braddock duplex in April 1999,[12] he maintained his own insurance policy on his own vehicle, an Acura.[13] Moreover,

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9. In fact, according to Donna Reid Lunsford, Christine Anderson said that she was tired of supporting her son. Reid Affidavit.

10. Donna Reid Lunsford claims to have seen Anderson, Jr. drive one of the Andersons' vehicles and Anderson, Jr. stated he drove his mother's vehicle approximately three times. Depo. of Anderson, Jr. at p. 33. Assuming this is true, such evidence is insufficient, in light of the record before the Court to permit a jury to find that Anderson, Jr. was a resident of the Andersons' household.

11. In fact, the first time Anderson, Jr. moved out of his parents' home when he was approximately 18 years old, Christine Anderson filled out paperwork with their automobile insurance company at that time to remove him from the policy because he was no longer living in their household. Depo. of Christine Anderson at pp. 28 and 65.

12. The NHIC policy became effective April 9, 1999, the same month that Anderson, Jr. moved into the duplex.

13. Anderson subsequently relinquished possession of the Acura for failure to make his car payments, and his insurance lapsed for non-payment. This occurred before the accident.

the Andersons did not claim Anderson, Jr. as a dependant on their 1999 or 2000 Federal Tax Returns.

This Court is of the opinion that the nature of Anderson, Jr.'s visits to his parents' home and other contacts with them evidence strong bonds of kinship, but do not rise to the level of enjoyment of each part of the living facilities as contemplated by the *Broxsie* and other courts when determining residency in the insurance context. Likewise, the financial and other support that the Andersons provided does not rise to the level of sole support or dependency to establish that he or they had the present intention that he reside in their Belvedere home, but rather evidences the contrary intent by all parties that he maintain a separate residence apart from his parents at the Braddock Lane duplex. The financial and other support[14] he received from his parents in fact enabled Anderson, Jr. to continue to maintain his residence outside his parents' home and not become a consistent part of the community of the Andersons' Belvedere Lane home. Viewing all of the evidence in the light most favorable to the Defendants, the Court concludes that the financial support and contacts are best characterized as evidencing strong bonds of kinship, rather than any present intent to reside with his parents. The Court is of the opinion that on the record before the Court, a

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14. In addition to the support the Court has described, such support could also include Christine Anderson doing Anderson, Jr.'s laundry, as claimed by Donna Reid Lunsford and disputed by other testimony, but that would not change the Court's conclusion.

reasonable jury could only reach the conclusion that Anderson, Jr. was a visitor or transient with regard to the Andersons' household, and that he did not have significant additional attachments which would render him a consistent part of the household community as contemplated by *Broxsie*. Anderson, Jr. had not resided there with "no present intention of removing therefrom" (Broxsie at 597) for at least eight months prior to the accident, and neither he nor his parents had any present intent that he return to the Anderson household at the time of the accident.

Therefore, NHIC is entitled to a determination as a matter of law that Anderson, Jr. was not a resident of the named insured's household at the time of the January 5, 2000 accident, and as a result is not covered under the NHIC policy; and further, based on the foregoing, the Court will grant summary judgment as a matter of law in favor of the Plaintiff. Accordingly, it is

ORDERED AND ADJUDGED:

1. That Plaintiff's Motion for Summary Judgment (Doc.72) is granted and the Court determines that Jeffrey Bruce Anderson, Jr. was not a resident of the named insured's household at the time of the January 5, 2000 accident, and therefore is not covered under the NHIC policy; and

2. That entry of Final Judgment is hereby deferred pending Plaintiff's written notification to the Court by February 26, 2007, regarding the status and

proposed disposition of the case regarding the remaining three Defendants who have not appeared in this case: John P. Merlino, Jeffrey Bruce Anderson, Jr., and Juan Quiles, III.

DONE AND ORDERED this 7th day of February 2007.

s/ Howell W. Melton
HOWELL W. MELTON
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 19, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-11731-BB

NEW HAMPSHIRE INDEMNITY COMPANY, INC.,

Plaintiff-Counter-Defendant-Appellee,

versus

DONNA REID, as Personal Representative of the Estate of Jonathan Merlino, deceased, HELEN KEARNS, as Personal Representative of the Estate of Eric Scott Kearns, deceased,

Defendants-Counter-Claimants-Appellants.

BEFORE: ANDERSON, BARKETT and HILL, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellants is DENIED.

ENTERED FOR THE COURT:

s/ Rosey Barkett
UNITED STATES CIRCUIT JUDGE

No. 08-1178

FILED

APR 2 3 2009

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DONNA REID, as Personal Representative for the Estate of JONATHAN MERLINO, deceased, and HELEN KEARNS, as Personal Representative for the Estate of ERIC SCOTT KEARNS, deceased,

Petitioners,

v.

NEW HAMPSHIRE INDEMNITY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court's grant of summary judgment in favor of NHIC based on the determination that there was no coverage for Anderson Jr. under the Policy was properly affirmed by the Eleventh Circuit Court of Appeals.

2. Whether the Eleventh Circuit Court of Appeals afforded "full faith and credit" to the prior decisions made by Florida appellate courts.

CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings are identified in the caption of the case. In accordance with SUP. CT. R. 29.6, undersigned counsel hereby states that American International Group, Inc. is the parent company of Respondent, New Hampshire Indemnity Company, Inc.

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STATEMENT OF THE CASE

A. Course of Proceedings and Dispositions in the Lower Courts

This action arose in connection with a motor vehicle accident which occurred on January 5, 2000 in Flagler County, Florida. Anderson Jr. was alleged to have been driving a motor vehicle owned by Juan Quiles with Jonathan Merlino (deceased), and Eric Scott Kearns (deceased), both riding as passengers. As a result of the accident, the passengers were killed. Defendants filed a Complaint for Wrongful Death against Anderson Jr. and Quiles in the Circuit Court, Flagler County, Florida, Case Number 02-21CA. In the interim, Anderson Jr. was criminally charged with DUI Manslaughter, and entered a plea of *nolo contendere* to the charges on July 26, 2002. Anderson Jr. was sentenced to ten years in prison, and began his sentence that day. Petitioners obtained default judgments in the underlying action against Anderson Jr. and Quiles, and subsequently received a total money judgment award of six million, five hundred thousand dollars ($6,500,000.00) against Anderson Jr. and Quiles.

Petitioners demanded that NHIC pay the full $6,500,000.00 judgment, alleging that the Policy issued by NHIC to Jeffery B. Anderson Sr., as the Named Insured, provided coverage for this vehicle accident because the Named Insured's son, Anderson Jr., was alleged to have been driving Quiles' vehicle. Quiles allowed his insurance on the vehicle involved

in the accident to lapse sometime prior to the accident. A declaratory judgment action was filed by NHIC to determine its rights and responsibilities under the Policy. On February 7, 2008, the U.S. District Court for the Middle District of Florida, Jacksonville Division, granted summary judgment in favor of the Respondent, stating that "Therefore, NHIC is entitled to a determination as a matter of law that Anderson Jr. was not a resident of the named insured's household at the time of the January 5, 2000 accident, and as a result is not covered under the NHIC policy. . . ." Appendix A at App. 13. On appeal to the Eleventh Circuit Court of Appeals, after oral argument before the Court, summary judgment in favor of the Respondent was affirmed. The *per curiam* holding stated that:

> We have carefully reviewed the relevant Florida case law, and have compared the instant facts against the facts in those cases. We conclude that a reasonable jury would have to conclude under the facts of this case, and in light of the Florida case law, that Anderson Jr. had moved out of his parents' home and was living apart in the duplex. The fact that he was receiving some financial support from his parents is not alone sufficient to make him a member of the family under the policy and the case law.

Opinion of the United States Court of Appeals for the Eleventh Circuit, Dated and Filed September 19, 2008, at Appendix D at App. 19.

The Eleventh Circuit Court of Appeals denied Petitioners' Petition for Rehearing on December 19, 2008.

The issue is whether Anderson Jr. was an insured under the Policy at the time of the accident on January 5, 2000.

B. Statement of the Facts Relevant to the Issue Presented in Petition for Writ of Certiorari.

NHIC issued a personal automobile policy to Jeffrey B. Anderson Sr., with effective dates from April 9, 1999 to April 9, 2000. Part A of the NHIC policy provides coverage for the "Insured," defined as "You" or any "family member" for the ownership, maintenance or use of any auto or "Trailer." The policy defines "family member" in the Definitions portion of the policy, F, as "a person related to you by blood, marriage or adoption *who is a resident of your household*. This includes a ward or foster child." The policy does not define the term "resident." Appendix A at App. 3-4.[1]

It is undisputed that at the time of the accident, Anderson Jr. had been living at 25B Braddock Lane

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[1] A copy of the policy was attached as an exhibit to Plaintiffs'/Respondent's Motion for Summary Judgment (Doc. 72) as well as to the Defendant/Petitioners' Response (Doc. 73).

in Palm Coast, Florida, ("the duplex") for at least eight to nine months. Anderson Sr. and C. Anderson (collectively, "the Andersons"), lived at 87 Belvedere Lane in Palm Coast, Florida, a single-family dwelling, at the time of the January 5, 2000 accident, and had been living at that address for some years.[2] While residing at 87 Belvedere Lane, the Andersons owned both the "A" and "B" side of the duplex located at 25 Braddock Lane in Palm Coast, Florida. While residing at 25B Braddock Lane, Anderson Jr. had three roommates: John Hall, who resided at that address only a few months; Dos Santos, who resided at that address for approximately a year, and Quiles, who became roommates with Anderson Jr. and Dos Santos after John Hall moved out, and remained for approximately nine months. While there was no written lease, the Andersons set a monthly rental charge of approximately $600 from Anderson Jr. and his roommates for the "B" side of the duplex. Anderson Jr. and his roommates were also responsible for the utilities for the "B" side of the duplex. The electric bill was in the name of Anderson Jr. Anderson

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[2] Prior to Anderson Jr.'s move into the "B" side of the duplex in April of 1999, it was occupied by Anderson Jr.'s grandparents. Anderson Jr.'s grandparents were on a fixed social security income and paid little to no rent to the Andersons during the time they occupied the duplex, and approximately six months after the death of her husband on October 31, 1998, Lorraine Anderson moved from the duplex to Ocala, Florida.

Jr. was responsible for his own grocery bills. Rental and utility payments were typically made in cash.

Anderson Jr. consistently paid his full rental share until the cash payments he received from his employer for an on-the-job accident suffered by Anderson Jr. ceased. Subsequent to the accident, Anderson Jr. was temporarily unemployed and was occasionally unable to pay his full share of the rent on a timely basis. Anderson Jr. continued to make utility payments for the duplex.

Anderson Jr. was employed at Top of the Line Concrete at the time of his on-the-job accident. Anderson Jr.'s hand required surgery and pins were placed in his hand/fingers. Anderson Jr. was advised by his employer that the employer would pay Anderson's medical bills as a result of the on-the-job accident, but the employer subsequently refused to do so, and Anderson Jr. began working odd-jobs and seeking employment elsewhere. Anderson Jr. subsequently filed a Workers Compensation claim against his employer as a result of the aforementioned on-the-job accident, and eventually received a settlement of approximately $10,000.

Anderson Jr. had, in fact, been consistently employed, prior to the on-the-job accident, since his junior year in high school, and purchased his first vehicle on his own with money he earned working during the summer between his junior and senior year. Anderson Jr. moved out of the Andersons' household shortly after leaving high school, purchasing with his own money a

single-wide mobile home, which he shared with his then-girlfriend. Anderson Jr. secured placement in the U.S. Army during the foregoing time frame; after his girlfriend left him, Anderson Jr. sold the mobile home and returned to his parents' home on an *intentionally temporary basis* before his anticipated placement with the Army.[3] Anderson Jr. subsequently moved to Indian Orchard, Massachusetts, where he paid $200 per month in rent to his aunt and worked consistently until returning to Palm Coast, Florida.

Upon his return to Palm Coast from Indian Orchard in 1998, Anderson Jr. moved into his parents' home at 87 Belvedere Lane with the intent to stay at that address on only a *temporary basis,* with no intent to remain on a permanent basis. Anderson Jr. had his own vehicle and his own vehicle insurance while he stayed at the Andersons' home. Anderson Jr. began working upon his return to Palm Coast from Indian Orchard, and remained consistently employed until his aforementioned on-the-job accident. *After* the January 5, 2000 accident, Anderson Jr., moved into his parents' home on an *intentionally temporary basis* while recovering from his injuries, which were severe, with the intention of returning to the duplex when he recovered. After approximately two months, when he was able to care for himself, Anderson Jr.

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[3] Anderson Jr.'s acceptance by the U.S. Army was subsequently rescinded as a result of an altercation and criminal arrest stemming from his girlfriend's decision to leave him for another man; Anderson Jr. then moved to Indian Orchard, Mass.

returned to his home at the duplex. When Anderson Jr. moved into the duplex in April of 1999, and throughout the course of his residency at the duplex, there was no intent of or understanding on the part of the Andersons to be a source of financial support for Anderson Jr., and Anderson Jr. had no expectation of financial support from the Andersons. Anderson Sr. offered no financial support whatsoever to Anderson Jr. and C. Anderson would, on occasion, either give or loan Anderson Jr. "ten or twenty bucks here and there" or not demand immediate payment of rent, but essentially expected Anderson Jr. to support himself and had no intention of having Anderson Jr. return to the Andersons' home.[4] Moreover, the Andersons did not claim Anderson Jr. as a dependant on their 1999 or 2000 Federal Tax Returns.

Notably, it was not unusual for C. Anderson to also give or loan money to her *friends* or *family members* when asked. Moreover, when Anderson Jr., his friends, his sisters, or any other friends of the Andersons would visit the Andersons at their home,

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[4] For purposes of ruling on NHIC's Motion for Summary Judgment, the District Court correctly assumed that Anderson Jr. sometimes paid his full rental share, sometimes made a partial rental payment, and sometimes did not pay anything toward his share, depending on his employment status. The record is undisputed that he was supposed to be paying rent to his parents to live at the Braddock duplex and that he was never threatened with eviction for any partial or non-payment. *See* Appendix A, Opinion and Order of the United States District Court, February 8, 2007, at App. 8.

they were usually permitted access to the refrigerator and often encouraged to share a meal. However, Anderson Jr. did not have *unfettered access* to the Anderson household, and, in fact, did not even possess a key to 87 Belvedere Lane. Anderson Jr. did not have a bedroom at 87 Belvedere. Anderson Jr. rarely, if ever, spent the night at 87 Belvedere. Moreover, Anderson Jr. did not keep any personal items at 87 Belvedere Lane. Anderson Jr. did not have keys to any of the Andersons' vehicles and did not have permission to drive their cars. The Andersons did not intend that Anderson Jr. be insured under the Policy.

When Anderson Jr. moved into the duplex in April 1999,[5] he maintained his own insurance policy on his own vehicle, an Acura.[6] After the Acura was damaged in an accident by Anderson Jr.'s roommate, Dos Santos, Anderson Jr. relied on his roommates, friends, and his employer for transportation. Anderson Jr. would occasionally go weeks at a time without visiting his parents' home and Anderson Sr., who stayed at home as a result of his stroke, estimated that Anderson Jr. visited the Anderson household approximately twice a month. Anderson Jr. testified that he would occasionally "Go over there and hang

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[5] The NHIC policy became effective April 9, 1999, the same month that Anderson Jr. moved into the duplex.

[6] Anderson subsequently lost the Acura, which was co-signed by his maternal grandmother, when he could no longer make the payments, and his insurance lapsed for non-payment. This occurred before the accident.

out and just talk with them and stuff and – you know, *and then go home.*" The Andersons were not frequent visitors of the duplex and visited there only occasionally. Because his father's stroke rendered Anderson Sr. physically unable to perform some household tasks, Anderson Jr. would occasionally assist his mother with home or lawn maintenance.[7] Anderson Jr. was never a student, on either a full or part-time basis, throughout the entire time that Anderson Jr. lived at the duplex.

C. Summary Judgment Standard

Both the district court and the Eleventh Circuit Court of Appeals correctly determined that summary judgment was to be granted in favor of Respondent because there was a clear absence of any genuine issues of material fact, even when all the evidence was viewed in the light most favorable to the Petitioners. All motions for summary judgment are

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[7] The District Court correctly summarized that at the time of the fatal accident, Anderson Jr. did not have a key to the Andersons' home, did not have a bedroom at the Andersons' home nor would one have been available for his use, he rarely, if ever, spent the night there, and some of his personal items were stored in boxes in the garage. *See* Appendix A at App. 9. When he visited his parents' home, Anderson Jr. was permitted to help himself to the contents of the refrigerator and he sometimes dined there with family members. The District Court stated that a jury could find that while he visited his parents' home, he also watched television, used the swimming pool, and sometimes helped with some chores around the house. *See id.*

considered based upon the standards of review set forth by the Supreme Court in *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348 (1986). The Federal standard for evaluating motions for summary judgment is set forth in Rule 56(c), FED. R. CIV. P., which provides, in pertinent part, as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
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> Rule 56(c), FED. R. CIV. P.

The burden is on the moving party to meet the standard set forth in Rule 56(c). *See Adickes v. SoHo Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970); *City of Delray Beach, Florida v. Agricultural Ins. Co.*, 85 F.3d 1527, 1529 (11th Cir. 1996). The Eleventh Circuit holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue of *material* fact when all the evidence is viewed in the light most favorable to the nonmoving party. *See Sweat v. Miller Brewing Co.*, 708 F.2d 655 (11th Cir. 1983) (emphasis added); *Matsushita Electric Industrial Corp., supra.* However, "*the mere*

existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *See Raske v. Dugger*, 819 F. Supp. 1046, 1052 (M.D. Fla. 1993) (*citing Anderson,* 477 U.S. at 252, 106 S.Ct. at 2512).

SUMMARY OF ARGUMENT

The Eleventh Circuit Court of Appeals correctly affirmed the district court's granting of final summary judgment in favor of NHIC because the district court correctly determined, based on the record evidence, material facts, and relevant Florida law, that Jeffery B. Anderson Jr. was not an insured under the NHIC policy of insurance issued to his parents, Christine and Jeffery B. Anderson Sr., at the time of his accident on January 5, 2000, because Anderson Jr. was not a resident of the insured's household.

ARGUMENT

I. THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT DETERMINING THAT NO COVERAGE IS AFFORDED TO ANDERSON JR. UNDER THE POLICY ISSUED TO ANDERSON SR. FOR THE DAMAGES ALLEGED BY THE PETITIONERS WAS PROPERLY AFFIRMED BY THE ELEVENTH CIRCUIT COURT OF APPEALS BECAUSE THERE WERE NO MATERIAL FACTS AT ISSUE TO SUPPORT PETITIONERS' POSITION THAT ANDERSON JR. WAS A RESIDENT OF THE NAMED INSURED'S HOUSEHOLD AT THE TIME OF THE ACCIDENT.

The Eleventh Circuit Court of Appeals properly affirmed the District Court's grant of final summary judgement in favor of Respondent. As a matter of Florida law, there is no coverage afforded to Anderson Jr. under the Policy issued to Anderson Sr. for the damages alleged by the Petitioners because Anderson Jr. was not a resident of the named insured's household at the time of the accident, and was thus not an insured under the NHIC policy.

The issue of insurance policy interpretation is a recurring one in both the Florida and the Federal court systems. The basis for the trial court's jurisdiction in the instant case was Federal diversity and, therefore, the substantive law of Florida was applied. Under Florida law, the Policy is a contract of insurance. The construction and effect of a written contract

are matters of law to be determined by the Court. *See Lazzara Oil Co. v. Columbia Cas. Co.*, 683 F. Supp. 777 (M.D. Fla. 1988). "Ordinary rules of construction require [the Court], first, to assess the natural or plain meaning of the policy language at issue." *Valiant Ins. Co. v. Evonosky*, 864 F. Supp. 1189, 1191 (M.D. Fla. 1994) (*quoting Landress Auto Wrecking Co., Inc. v. United States Fidelity & Guaranty Co.*, 696 F.2d 1290, 1292 (11th Cir. 1983)). Here, the interpretation and application of the definition of "family member" in the policy, as it applies to the instant issue of coverage, was within the exclusive jurisdiction of the district court.

The issue of residency under an insurance policy is typically a factual matter. However, when the facts are essentially undisputed, the district court may determine whether a family member is a resident as required for coverage under the policy. *See* Appendix A at App. 4 (*citing State Farm Fire and Casualty Co. v. Nickelson*, 677 So.2d 37, 38 (Fla. 1st DCA 1996); *Kepple v. Aetna Casualty and Surety Co.*, 634 So.2d 220, 221 (Fla. 2d DCA 1994)). Based upon the testimony of all witnesses, the material facts surrounding the issue of residency of Anderson Jr. at the time of the accident are essentially undisputed. Therefore, the trial court correctly determined, and the Eleventh Circuit Court of Appeals correctly affirmed, that as a matter of law Anderson Jr. was not a resident of the named insured's household at the time of the January 5, 2000 accident as required for coverage under the NHIC Policy, as he had not resided there on any

permanent basis for at least eight months prior to the accident, and he had no present intent to return to the Anderson household at the time of the accident.

Although arising in a divorce action, the following statement of the Florida Supreme Court in *Kiplinger v. Kiplinger,* 2 So.2d 870 (Fla. 1941) is often quoted by courts when ruling on the residency issue in the insurance context:

> The residence of a party consists of *fact* and *intention. Warren v. Warren*, 73 Fla. 764 (1917). Residence indicates place of abode, whether permanent or temporary. *Minick v. Minick*, 111 Fla. 469, 149 So. 483. A resident is one who lives at a place *with no present intention of removing therefrom. Tracy v. Tracy*, 62 N.J. Eq. 807 (1901).
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> *Kiplinger* at 873. (Emphasis added.)

In determining the issue of residency in the present case, both the district court and the Eleventh Circuit Court of Appeals correctly applied the guidelines set forth in *General Guarantee Ins. Co. v. Broxsie*, 239 So.2d 595 (Fla. 1st DCA 1970), and agreed with the criteria set forth by the trial judge for determining the issue of residency, as follows:

> What appears to distinguish a person as a resident or non-resident is that the resident is more than a mere visitor or transient, but lives at a place with additional attachments *of such significance* as to render that person a more or less *consistent part of the community.*
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> *Broxsie* at 597.

In addition to the additional significant attachments consideration, the *Broxsie* court created a three-part test for determining residency. That test, now the hallmark test of residency cases in the context of insurance coverage in Florida, was correctly applied by the District Court in this case, and states the following:

> Those merely dwelling under the same roof does not constitute them members of the same household, but such is the result when they share common bonds of kinship *and also share the facilities of the house for living purposes. The three ingredients are (1) close ties of kinship; (2) a fixed dwelling unit; and (3) enjoyment of each part of the living facilities.* The main thread of a household or family is the sharing of companionship and of the living facilities of the dwelling unit by the members of the household.

Broxsie at 597. (Emphasis added.)

The deposition testimony taken of every witness in the instant action makes it clear beyond question that Anderson Jr. was not a member of the named insured's household. Indeed, the facts support only part *one* of the *Broxsie* test – close ties of kinship as the named insured's son. However, absolutely none of the remaining criteria for residency as a member of the named insured's household are met by the facts in this case. The District Court reviewed all the deposition testimony, affidavits, and evidence submitted,

and found that the essential material facts surrounding the issue of residency of Anderson Jr. at the time of the accident are undisputed. To the extent that facts are disputed, the Court noted them, viewed them in the light most favorable to the Petitioners, and correctly found that they are not material, in that they would not support a reasonable jury finding in favor of the Petitioners.

A. Anderson Jr. was not living in or a part of the fixed dwelling unit of the named insured.

It is undisputed that Anderson Jr. lived at 25B Braddock Lane – the duplex – for at *least* eight months prior to the accident. It is also undisputed that the named insured/the Andersons lived at 87 Belvedere Lane and had lived at that address for years prior to the accident. The duplex and the Andersons' single family home were not connected, were not on the same plot or lot, and in fact were not even on the same street, nor were the separate residences utilized on a regular basis by all the family members. In no way could the separate abodes be combined to be considered a "fixed dwelling unit" of any kind, and mere ownership of both dwellings by the named insured fails to support a finding that these wholly separate dwellings were a "fixed dwelling unit."

B. Anderson Jr. did not share enjoyment of each part of the living facilities – whether at 25B Braddock Lane or 87 Belvedere Lane – with the named insured.

The evidence overwhelmingly shows that Anderson Jr. did not share enjoyment of each part of the living facilities of the named insured's home. Anderson Jr. did not have his own key to the Andersons' home and thus could not simply "come and go" as he desired; he only visited the home infrequently, rarely more than twice in one week, and often did not visit for weeks at a time. Likewise, the Andersons' visits to Anderson Jr.'s home at 25B Braddock Lane were even more infrequent. Finally, Anderson Jr. did not have a bedroom at the Andersons' home and did not utilize the home for storage of his personal belongings. Certainly, when Anderson Jr. did visit his parents' house, he was allowed to go into the kitchen and "raid the fridge;" the same open invitation was extended by the Andersons to any family member or visitor. Moreover, any family member or friend was invited to share a meal with the Andersons. However, such invitations hardly constitute *sharing of enjoyment of each part of the living facilities* as contemplated by the *Broxsie* court and others when determining residency in the insurance context. There was no evidence that Anderson Jr. shared enjoyment of each part of the living facilities of the named insured's home, and the trial court correctly found that there

was no genuine issue as to any material fact regarding Anderson Jr.'s residency.

C. Anderson Jr. was a mere visitor or transient at his parents' home with no significant attachments rendering him a consistent part of the community.

All the testimony from the witnesses makes it clear that Anderson Jr. was a mere visitor or transient regarding the Andersons' household and did not have significant additional attachments which would render him a consistent part of the household community. Anderson Jr. maintained none of his personal possessions at the named insured's household, did not have a key to enter the household on his own, did not have a bedroom at the Andersons' home, and his sporadic visits to the household evidences that he was not a consistent part of the household community. Anderson Jr. was nothing more than an occasional visitor to the home of the Andersons.

D. Anderson Jr. had no present intent to return to the named insured's household at the time of the January 5, 2000 accident.

All the evidence indicated that Anderson Jr. had no present intent to return to the Anderson household at the time of the accident, and only returned to the household *after* the accident for assistance while

recovering from the injuries he sustained. The evidence shows that as soon as Anderson Jr. was able to care for himself, within two months, he returned to the duplex. Further, the evidence shows that the Andersons did not intend for Anderson Jr. to return to their household at the time of the accident. Because neither Anderson Jr. nor his parents intended for Anderson Jr. to return to the Anderson household at the time of the accident, there is no genuine issue as to any material fact regarding Anderson Jr.'s residency, and NHIC is entitled to summary judgment as a matter of law.

E. There are no genuine issues of material fact in the instant case that meet the criteria considered by the courts for a determination of residency.

The case law and evidence argued by the Petitioners in support of their appeal of the final summary judgment entered by the District Court fail to adequately address the *Broxsie* standards, and fall far short of showing anything other than close ties of kinship between Anderson Jr. and his parents. Even in many cases where no coverage has been afforded due to lack of residency, there is some connection between the insured and the relative claiming benefits under the insured's policy. However, Florida courts have consistently rejected residency claims in cases where the connection was far stronger than the

case at hand.[8] Necessarily, relatives who are found to be covered under insurance policies where the residency issue has arisen have much closer ties to the family unit than those in which the relative has been excluded from coverage.[9] The uncontroverted sworn testimony of all the witnesses in the instant action,

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[8] *See Whitten v. Allstate Insurance Co.*, 476 So.2d 794 (Fla. 1st DCA 1985) (no coverage for son under mother's automobile policy even though son physically resided in mother's household for three months prior to accident while separated from wife); *Sembric v. Allstate Insurance Co.*, 434 So.2d 963 (Fla. 4th DCA 1983) (no coverage for nephew under uncle's insurance policy where uncle resided with nephew in Florida seven weeks out of the year); *Cavalier Ins. Corp. v. Bailey*, 292 So.2d 67 (Fla. 3d DCA 1974) (daughter not entitled to uninsured motorist benefits under father's policy of insurance while living in separate household with divorced mother for 1-1/2 years); *Griffin v. General Guarantee Insurance Co.*, 254 So.2d 574 (Fla. 3d DCA 1971) (no coverage for uncle under nephew's insurance policy even though uncle resided with nephew three or four days per week).

[9] *See Seitlin & Co. v. Phoenix Insurance Co.*, 650 So.2d 624 (Fla. 3d DCA 1994) (son, a *full-time student*, covered under parents' homeowners policy where son treated parents' home as permanent residence, *maintained room* and *possessions* at parents' home, and parents were *sole* financial support.); *Kepple v. Aetna Casualty and Surety Co.*, 634 So.2d 220 (Fla. 2d DCA 1994) (daughter entitled to uninsured motorist coverage as a resident of parents' household where daughter and husband resided in *enclosed carport attached to parents' home* and had *free access* to parents' home with *no separate utilities, address, or mailbox*); *Alava v. Allstate Insurance Co.*, 497 So.2d 1286 (Fla. 3d DCA 1986) (son of divorced parents a resident of both households where son spent significant time in both mother's and father's households and clear intent of parents that son maintain relationship with both parents).

however, makes it clear that Anderson Jr. was *not* a resident of the Andersons' home at the time of the accident, even when construing "residency" as liberally as permitted in common usage so as to give effect to the intentions of the parties and purposes of the insurance. *See State Farm Mutual Automobile Ins. Co. v. Johnson*, 536 So.2d 1089 (Fla. 4th DCA 1988).

Viewing the facts of the instant matter alongside facts of the most potentially analogous cases argued by the Petitioners in the lower courts and in the Petition, wherein coverage has been found by a Florida court, the connections between Anderson Jr. and the Andersons are clearly insufficient to consider Anderson Jr. to be a resident of the household of the Andersons for purposes of insurance coverage. For example, in *Sutherland v. Glens Falls Ins. Co.*, 493 So.2d 87 (Fla. 4th DCA 1986), cited by the Petitioners' Petition for Writ of Certiorari at pp. 11 and 17, the insured's son had moved into his own apartment shortly prior to becoming involved in an accident for which he sought uninsured motorist benefits under his mother's policy of insurance. *See id.* The named insured, his mother, paid the full rent for her son's apartment until approximately two weeks after the accident, *all* of the insured's son's clothing, other than work clothes, was at the named insured's residence, the insured's son ate either *at work or at his mother's residence,* and there was no telephone at the insured's son's apartment. Further, testimony indicated that the insured's son was "testing the waters – trying to determine if he could live independently from his

mother," and that he had stated that he *intended* to return to his mother's home. *See id.* The facts showed that Sutherland was unquestionably more than a mere visitor or transient at his mother's home; rather, he spent as much time at his mother's house as he spent in the apartment she rented for him, had significant attachments to the home, was a consistent part of the community, and intended to return to that household community.

In the instant case, in no way was Anderson Jr. simply "testing the waters" at 25B Braddock Lane; he moved from his parents' home shortly after high school and never intended to return to the Andersons' household on a *permanent* basis. Anderson Jr. returned twice, on an *intentionally temporary* basis, to the Andersons' home since first moving out after high school – while awaiting his assignment from the Army and returning from Indian Orchard, just before moving to 25B Braddock Lane. Anderson Jr. maintained consistent employment during and since high school. Anderson Jr. had been living separate and apart from his parents' household well before the time that the accident occurred. Unlike Sutherland, Anderson Jr. did not routinely and consistently eat his meals at the Anderson household, had no personal possessions at the Anderson household, and his parents had *no* intent to pay his rent or financially support him. Anderson Jr. had *no present intent* to return to the Andersons' household at the time of the accident and was a mere visitor or transient at his

parents' home – he had no key to the home, no possessions in the home, and visited the home on a sporadic basis.

Petitioners fail to discern vital facts regarding the *Broxsie* standards in their mistaken reliance on *Row v. United States Automobile Association*, 474 So.2d 348 (Fla. 1st DCA 1985). In *Row*, the Court looked to the extraordinary circumstances to find that Mark Row was a member of his father's household so as to be covered under his father's policy of insurance for UM benefits. Mark's divorced father owned and lived in an apartment complex consisting of 12 one-bedroom apartments, contained within three quadraplexes located on the same plot of land. *See id.* Mark lived with his father in his apartment since 1978, began experiencing *signs of mental illness* at that time, and over the next three years, Mark was jailed, hospitalized, and transferred to several institutions for treatment of his *on-going* mental illness. Mark's father assumed the responsibility for Mark's hospital costs incurred as a result of Mark's mental illness, and Mark was actually released to his father's care in 1981. *See id.* Mark made a failed single attempt to live separate and apart from his father, but returned in two months. By that time, *all* of the "Row children" lived at the apartments; they *all* had *master keys* to the family apartments; they could come and go into all of the family apartments as they pleased, and while they slept in individual apartments, they considered the family apartments "the family dwelling." *See id.* Mark, specifically, maintained *no utilities* at his

apartment, and used his father's apartment to cook, eat, bathe, and socialize – essentially, everything but sleep. *See id.*

Notably, Mark continued to suffer mental disturbances and was *unable* to work as a result of his on-going mental illness and, in fact, had never held a job for more than a week and a half. Mark was essentially *mentally incapable* of caring for himself, and relied on his father for *all* means of support, including financial and emotional support. *See id.* Determining Mark was a member of his father's household, the *Row* court found, utilizing the *Broxsie* test, that the proximity of the apartments on the same plot of land and contained within three adjacent quadraplexes was sufficient to constitute a fixed dwelling. All of the "Row children" had keys *and* the use and enjoyment of all the family apartments, and specifically Mark enjoyed the use of his father's apartment for everything but sleeping. The court did not deem Mark a mere visitor or transient because of Mark's daily use of his father's apartment and his significant attachments to the family dwelling. Finally, there was *no* evidence that either Mark or his father had any present intent at the time of the accident for Mark's living arrangements to change.

None of the facts in the instant action are similar to the extraordinary set of circumstances in *Row*. Row's on-going mental illness prevented him from caring for himself; his lack of employment is no basis of comparison to Anderson Jr.'s temporary lack of employment. Anderson Jr.'s on-the-job injury presented

a temporary employment set back; however, Anderson Jr. performed other odd jobs he was physically capable of performing in order to earn income and maintain residency at the duplex, and he intended to return to full-time employment. Unlike Anderson Jr., Row's on-going mental illness *prevented* him from maintaining any employment whatsoever.

Anderson Jr. did not live in a "family compound" environment enjoyed by the Row children; none of Anderson Jr.'s siblings shared his duplex or the "A" side of the duplex during the eight to nine months that Anderson Jr. lived at the duplex before the accident. The ability of Anderson Jr. and others to help themselves to the Andersons' refrigerator on the occasions that he visited hardly rises to the level of sharing a part of each of the living facilities enjoyed by Mark Row in consistently utilizing his father's apartment for essentially *every* activity but sleeping.

Petitioners' reliance on *Patterson v. Cincinnati Insurance Company*, 564 So.2d 1149 (1990), cited by the Petitioners at page 10 in support of their Petition for Writ of Certiorari, is also misplaced. In *Patterson*, the issue before the Court was whether Melissa Patterson and her parents made a material misrepresentation to their insurance company regarding their daughter's residency status in order to obtain uninsured motorist benefits. The court determined that there was an issue of fact regarding the issue of material misrepresentation on the part of the insured parents, finding that it was incumbent upon the parents/insureds to advise Cincinnati that their

daughter had access to the insured vehicles; and because they failed to do so, the Pattersons had misrepresented their daughter's status as a driver in their household when the parents' policy was renewed. Because such a misrepresentation was material to Cincinnati's acceptance of the risk, the court granted Cincinnati's motion for summary judgment. The First District Court of Appeal found that the evidence regarding her residency could point in either direction, thus summary judgment was improper.

The facts surrounding the *Patterson* case have no bearing on the question of whether Anderson Jr. was insured under the NHIC policy of insurance at the time of the subject accident. There are no allegations of material misrepresentation by the insured parents in this action, neither the insured parents nor Anderson Jr. attempted to obtain any benefits from NHIC, and both the district court and the Eleventh Circuit Court of Appeals determined that based on the material facts presented, no reasonable jury could find that Anderson Jr. was a resident of his parents' household at the time of the accident.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS AND THE DISTRICT COURT AFFORDED "FULL FAITH AND CREDIT" TO THE PRIOR RULINGS OF THE DECISIONS MADE BY FLORIDA APPELLATE COURTS.

Florida courts, including the Florida Supreme Court, have clearly delineated the factors that must

be considered when determining residency. The district court and the Eleventh Circuit Court of Appeals applied the applicable Florida state law citing the factors considered by Florida state courts of appeal, and correctly determined that Anderson Jr. was not a resident of the policy holders' home.

U.S.C. § 1652. **State laws as rules of decision**, provides that "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." A federal court sitting in diversity jurisdiction applies state law of the state in which it sits. *See Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817 (1938); *Miller v. Anheuser Busch, Inc.*, 591 F. Supp.2d 1377 (S.D. Fla. 2008); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S.Ct. 2505 (1986). The applicable substantive law will identify those facts that are material. *Id.* at 248. Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. *Id.*

Moreover, the district court and the Eleventh Circuit Court of Appeals properly applied federal *procedural* law – the law of the forum – regarding the summary judgment at issue. "According to *Erie* . . . it is clear that federal courts are bound only b[y] the substantive law of the states and *not* the state *procedural* rules." *Baird v. Celis,* 41 F. Supp.2d 1358, 1359

(N.D. Ga. 1999) (emphasis added). After *Erie,* the federal courts struggled in distinguishing between "substantive" requirements to which state law applied and "procedural" requirements that were governed by federal law. In *Hanna v. Plumer,* 380 U.S. 460, 85 S.Ct. 1136 (1965), the United States Supreme Court ruled that federal courts sitting in diversity should apply the Federal Rules in diversity cases, even though the Federal Rules may conflict with state laws that seem to have a substantive effect. Therefore, Petitioners' argument that the district court and Eleventh Circuit Court of Appeals failed to afford "full faith and credit" must fail. The district court and the Eleventh Circuit Court of Appeals correctly and appropriately applied the Federal Rules of Civil Procedure in the instant action – specifically, Rule 56, FED. R. CIV. P.[10]

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[10] In addition, it should be noted that Rule 56, Summary Judgment, FED. R. CIV. P. and Rule 1.510, Summary Judgment, FLA. R. CIV. P., are virtually identical, and have been for decades. "This rule is substantially the same as former Rule 1.36 as amended and Federal Rule 56." Rule 1.510, FLA. R. CIV. P., Authors' Comment – 1967. The Federal and Florida standards applied to the judicial proceedings, as well as the standards governing summary judgment, are identical. Therefore, the outcome of the summary judgment at issue would not have changed regardless of which rule – Federal or Florida – had been applied.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Rule 10 of the Supreme Court provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory power.
>
> . . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

SUP. CT. R. 10.

Rule 10 further notes, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioners have failed to provide any compelling reason for the granting of a Writ of Certiorari in this action. The opinions and orders in this action do not conflict with those of other United States Courts of Appeals, nor do they conflict with Florida State substantive and procedural law. The opinions and orders did not depart from the accepted and usual course of judicial proceedings, nor sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory power. There is no important question of either federal or state law. Rather, the Petitioners have asserted that the error of the district court and Eleventh Circuit Court of Appeals essentially consists of "erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* In sum, no compelling reason of any kind exists for the granting of a Writ of Certiorari in the instant action.

CONCLUSION

Petitioners' Petition for Writ of Certiorari should be denied because there is no compelling reason for the Petition to be granted. The district court and the Eleventh Circuit Court of Appeals appropriately applied the substantive law of Florida and Federal procedural rules in making a determination as to the granting of summary judgment in favor of the Respondent, finding that none of the facts in evidence in the instant case support a finding that Anderson Jr.

was a member of the named insured's household at the time of the accident of January 5, 2000. Even when viewing the evidence in a light most favorable to the Petitioners, the lower courts correctly found that the evidence fails to rise above a mere scintilla in support of the Petitioners' position that Anderson Jr. was a member of the named insured's household at the time of the accident so as to be an insured under the Policy. The lower courts reviewed all the evidence, deposition testimony, affidavits, and exhibits, and found that the nature of Anderson Jr.'s visits to his parents' home and other contacts with his parents evidence strong bonds of kinship, but do not rise to the level of enjoyment of each part of the living facilities as contemplated by the *Broxsie* and other courts when determining residency in the insurance context, *see* Appendix A at App. 12; that "the financial support and contacts are best characterized as evidencing strong bonds of kinship, rather than any present intent to reside with his parents," *id.*; and "a reasonable jury could only reach the conclusion that Anderson Jr. was a visitor or transient. . . ." *Id.* at App. 13. Therefore, final summary judgment in favor of NHIC by the district court, and the affirmation of same by the Eleventh Circuit Court of Appeals, was proper,

and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NEW HAMPSHIRE INDEMNITY COMPANY, INC.,

Plaintiff,

vs.

DONNA REID, as Personal Representative of the Estate of Jonathan Merlino, deceased, HELEN KEARNS, as Personal Representative of the Estate of Eric Scott Kearns, deceased, JOHN P. MERLINO, JEFFREY BRUCE ANDERSON, JR., and JUAN QUILES, III,

Defendants,
_____/

CASE NO.:
3:05-CV-1280-J-12MCR

OPINION AND ORDER

(Filed Feb. 8, 2007)

This case comes before the Court on Plaintiff's Motion for Summary Judgment (Doc.72) requesting a determination on its Complaint for Declaratory Relief (Doc.1) that Jeffrey Bruce Anderson, Jr. (Anderson, Jr.) is not an insured under the New Hampshire Indemnity Company, Inc. (NHIC) policy of insurance issued to his father, Jeffrey B. Anderson,

Sr. (Anderson, Sr.), as the named insured. Plaintiff asserts that Anderson, Jr. was not a covered resident member of the household of Anderson, Sr. and his wife (Anderson, Jr.'s mother), Christine Anderson (the Andersons), on January 5, 2000, when he was involved in a fatal car accident.[1] Defendants, Donna Reid (Donna Reid Lunsford) and Helen Kearns, the representatives of the estates of the two young men killed in the accident, filed a memorandum in opposition to the motion for summary judgment (Doc.73). These two Defendants obtained a Final Judgment (Doc.73, Exh.4) against Jeffrey Bruce Anderson, Jr. and Juan Quiles, III, in the amount of $3,000,000.00 each. That Final Judgment also awarded John P. Merlino $500,000.00 against Jeffrey Bruce Anderson, Jr. and Juan Quiles, III. Following oral argument by the parties and after considering the facts, evidence, and law applicable to this matter, the Court will grant Plaintiff's Motion for Summary Judgment for the reasons set forth below.

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue of a material fact and that the moving party is entitled to judgment as a

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[1] The ruling on Plaintiff's Motion for Summary Judgment also resolves the Defendants' Counterclaim contained in Doc. 33, as it seeks a determination by the Court that Anderson, Jr. was a covered resident member of the Andersons' household and therefore insured under the NHIC policy.

matter of law." FED.R.CIV.P. 56(c). The burden is on the moving party to meet the standard set forth in Rule 56(c). *See Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). In the Eleventh Circuit, summary judgment should only be granted where the moving party has sustained its burden of showing the absence of a genuine issue of material fact when all the evidence is viewed in the light most favorable to the nonmoving party. *See Sweat v. Miller Brewing Co.,* 709 F.2d 665, 656 (11th Cir. 1983). An issue of fact is genuine only if a reasonable jury considering the evidence presented could find for the non-moving party. Material facts are those which will affect the outcome of the trial under governing law. "[T]he mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *See Raske v. Dugger,* 819 F.Supp. 1046, 1052 (M.D.Fla.1993) (*citing Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986)).

NHIC issued a personal automobile policy to Anderson, Sr., with effective dates from April 9, 1999 to April 9, 2000.[2] Part A of the policy provides coverage for the "Insured," defined as "You or any "family member" for the ownership, maintenance or use of any auto or "trailer." The policy defines "family member" as "a person related to you by blood, marriage or

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[2] A copy of the policy is attached as an exhibit to Plaintiff's Motion for Summary Judgment (Doc.72) as well as to the Defendants' response (Doc.73).

adoption who is a resident of your household. This includes a ward or foster child." The policy does not define the term "resident."

Plaintiff contends that Anderson, Jr., was not a resident of the Andersons' household at the time of the accident on January 5, 2000, and therefore was not insured under the NHIC policy. Defendants contend that Anderson, Jr. was a resident of both a duplex on Braddock Lane, as well as the Andersons' home on Belvedere Lane, and therefore was insured under the NHIC policy at the time of the accident.

The construction and effect of a written contract are matters of law to be determined by the Court. *See Lazzara Oil Co. v. Columbia Cas. Co.*, 683 F.Supp. 777 (M.D.Fla.,1988). "Ordinary rules of construction require [the Court], first, to assess the natural or plain meaning of the policy language at issue." *Valiant Ins. Co. v. Evonosky*, 864 F.Supp. 1189, 1191 (M.D.Fla.1994) (*quoting Landress Auto Wrecking Co., Inc. v. United States Fidelity & Guaranty Co.*, 696 F.2d 1290, 1292 (11th Cir.1983)). While the NHIC policy at issue in this case does contain a definition of "family member," it does not define "residency" which is required in order for the policy to provide coverage for such family member.

The issue of residency under an insurance policy is typically a factual matter. However, when the facts are essentially undisputed, the Court may determine whether a family member is a resident as required for coverage under the policy. *See State Farm Fire and*

Casualty Co. v. Nickelson, 677 So.2d 37, 38 (Fla. 1st DCA 1996); *Kepple v. Aetna Casualty and Surety Co.*, 634 So.2d 220, 221 (Fla. 2nd DCA 1994).

In *General Guarantee Ins. Co. v. Broxsie*, 239 So.2d 595 (Fla. 1st DCA 1970), the Court set forth guidelines for determining residency that have been utilized by many courts in the context of automobile insurance coverage. The Court also utilizes the *Broxsie* guidelines in determining whether or not Anderson, Jr. was a resident of the Andersons' household at the time of the fatal accident of January 5, 2000.

In *Broxsie*, the First DCA stated that "[w]hat appears to distinguish a person as a resident or nonresident is that the resident is more than a mere visitor or transient, but lives at a place with additional attachments *of such significance* as to render that person a more or less *consistent part of the community*." *Broxsie* at 597 (emphasis added). The *Broxsie* court identified three important considerations in determining residency: 1) close ties of kinship; 2) a fixed dwelling unit; and 3) enjoyment of each part of the living facilities. *Id.*.

The *Broxsie* also court noted that the residence of a party is a matter of both fact and intention, so it is important to consider the intent of the parties in making a residency determination. *Id.* (citation omitted). The issue of whether or not a person "lives at a place with no present intention of removing therefrom" is question that must be answered looking at the facts of the particular case. *Id.* (citations omitted).

The Broxsie court also observed that the term "resident of the same household" is ambiguous as employed by automobile insurance policies and "should be considered in its most inclusive sense." *Id.* (citation omitted).

The Court has reviewed all the deposition testimony submitted, including that of Anderson, Jr., Anderson, Sr., and Christine Anderson, as well as the affidavit of Donna Reid Lunsford (Reid Affidavit), and finds that the essential material facts surrounding the issue of residency of Anderson, Jr. at the time of the accident are undisputed.[3] To the extent that facts are disputed, the Court notes them, views them in the light most favorable to the Defendants, and finds that they are not material, in that they would not support a reasonable jury finding in favor of the Defendants. The Court summarizes the facts below.

Anderson, Jr. lived at the Braddock Lane duplex for at least eight months prior to the accident.[4] The duplex and the Andersons' single family home on

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[3] Citations to the record for the undisputed facts can be found in Plaintiff's Motion for Summary Judgment (Doc.72), pp. 5-12.

[4] Since approximately age 18, Anderson, Jr. had moved in and out of his parents' home several times before moving to the Braddock duplex in April 1999, and also stayed there after the accident to recuperate from his injuries. Anderson, Jr.'s intent was to live on his own, but various circumstances had him return to live with his parents until he could re-establish his own residence. *See e.g.*, Depo. of Anderson, Jr., at p. 88; Depo. of Christine Anderson, at pp. 29-30.

Belvedere Lane were separate residences on different streets and not a "fixed dwelling unit[5]."

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[5] The Court views the term "fixed dwelling unit" in its most inclusive sense, recognizing that, for the purposes of insurance coverage, Florida court determinations of residency since *Broxsie* have not imposed a hardline rule requiring that the proposed resident actually reside in the same physical dwelling household as the named insureds, that is, Florida courts have found that a person may be a "dual resident" of both the named insured's household and a separate dwelling. However, for the reasons stated in this opinion, the Court finds that the facts in this case are clearly distinguishable from those cases where Florida courts have found residency despite separate dwelling units, and do not support a finding in this case that Anderson, Jr. was a resident of the Andersons' household. *Cf, e.g., Dwelle v. State Farm Mutual Automobile Insurance Company*, 839 So.2d 897 (Fla. 1st DCA 2003) (at time of accident the named insured's son was a full-time college student, physically residing with his parents at his parents' home at the time of the accident, parents were intended sole source of financial support, son had not abandoned his parents' home, and parents claimed son as a dependant on their tax returns); *Seitlin & Co. v. Phoenix Insurance Co.*, 650 So.2d 624 (Fla. 3rd DCA 1994) (holding son, a full-time student, covered under parents' homeowners policy where son treated parents' home as permanent residence, maintained room and possessions at parents' home, and parents were *sole* financial support.); *Kepple v. Aetna Casualty and Surety Co.*, 634 So.2d 220 (Fla. 2nd DCA 1994) (holding daughter entitled to uninsured motorist coverage as a resident of parents' household where daughter and husband resided in enclosed carport attached to parents' home and had free access to parents' home with no separate utilities, address, or mailbox); *Alava v. Allstate Insurance Co.*, 497 So.2d 1286 (Fla. 3rd DCA 1986) (holding son of divorced parents a resident of both households where son spent significant time in both mother's and father's households and clear intent of parents that son maintain relationship with both parents); *Row v. United States*

(Continued on following page)

Anderson, Jr. shared the Braddock Lane duplex with various roommates. Though there was no written lease, the Andersons, who owned the duplex, charged Anderson, Jr. and his roommates $600 per month for the "B" side of the duplex, where they lived. All utilities were the responsibility of Anderson, Jr. and his roommates. The electric bill was in the name of Anderson, Jr., and Anderson, Jr. was responsible for all of his own personal bills, including utilities and groceries.

The record is disputed about whether Anderson, Jr. consistently paid his full share of the rent. For purposes of ruling on Plaintiff's Motion for Summary Judgment, the Court assumes that Anderson, Jr. sometimes paid his full rental share, sometimes made a partial rental payment, and sometimes did not pay anything toward his share, depending on his employment status. The record is undisputed, however, that he was supposed to be paying rent to his parents to live at the Braddock duplex and that he was never threatened with eviction for any partial or nonpayment.

Automobile Association, 474 So.2d 348 (Fla. 1st DCA 1985) (apartment complex owned by father was considered "family dwelling" for mentally ill son and other siblings, even though son slept in a separate apartment where son relied on father for emotional and financial support, son used father's apartment for everything except sleeping so was no mere visitor or transient, and there was no evidence of father's or son's intent at the time of the accident for son's living arrangements to change.).

His parents only occasionally visited Anderson, Jr. at the Braddock Lane duplex. The frequency of Anderson, Jr.'s visits to his parents' home on Belvedere Lane is disputed, ranging from an estimate of several times a week to sometimes no visits for weeks at time. Again, for purposes of ruling on Plaintiff's Motion for Summary Judgment, the Court assumes that a jury could find that Anderson, Jr. visited the Andersons' home several times each week.

At the time of the fatal accident, Anderson, Jr. did not have a key to the Andersons' home, did not have a bedroom at the Andersons' home nor would one have been available for his use, and rarely, if ever, spent the night there.[6] Some of his personal items were stored in boxes in the garage. When he visited his parents' home, Anderson, Jr. was permitted to help himself to the contents of the refrigerator and he sometimes dined there with family members. Despite various conflicting statements, the Court also assumes that a jury could find that while he visited his parents' home, he also watched television, used the swimming pool, and sometimes helped with some chores around the house.

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[6] In their response to Plaintiff's Motion for Summary Judgment (Doc.73), the Defendants assert that Donna Reid Lunsford's affidavit supports the fact that Anderson, Jr. sometimes slept in a recreational vehicle that was parked at the Andersons' Belvedere Lane home. The Court finds no such statement in her affidavit. Christine Anderson stated that she was not aware of Anderson, Jr. ever sleeping in the recreational vehicle. Depo. of Christine Anderson at p. 78.

The deposition testimony of Anderson, Jr., Anderson, Sr., and Christine Anderson regarding their intent as to the residency of Anderson, Jr. is unanimous and uncontroverted in the record. Anderson, Jr. stated that he considered the Braddock Lane duplex his home and that even before moving there he only stayed at his parents' Belvedere Lane home temporarily pending his ability to establish his home elsewhere.[7] *See e.g.* Depo. of Anderson, Jr. at pp. 36, ll 8-10, pp.71-72 and 88.

When Anderson, Jr. moved into the Braddock Lane duplex in April of 1999, and throughout the course of his residency at the duplex, Anderson, Sr. offered no financial support. Christine Anderson, his mother, sometimes on a weekly basis, would give or loan Anderson, Jr." ten or twenty bucks here and there." Christine Anderson also never threatened to evict Anderson, Jr. for partial or nonpayment of rent.[8] The Andersons expected Anderson, Jr. to support himself and had no intention of having Anderson, Jr.

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[7] The Defendants cite as evidence that Anderson, Jr. was a resident of the Andersons' Belvedere Lane address the ambulance report for Anderson, Jr. on the date of the fatal accident which shows Belvedere Lane as his address. Doc. 73, Exh. 9. The Court finds that this document is not probative of Anderson, Jr.'s residency because there is no indication of who provided the information contained in the report. Moreover, the report states that Anderson, Jr. was ejected from his vehicle, sustained multiple injuries, and his verbal ability was "confused."

[8] She also provided money to post $10,000 bail when Anderson, Jr. was arrested in September 1999.

return to their household on a permanent basis.[9] *See e.g.* Depo. of Christine Anderson at pp.29-30; Depo. of Anderson, Sr. at pp. 11, 24 and 31.

In addition, Anderson, Jr. did not have keys to any of the Andersons' vehicles.[10] Anderson, Sr. did not intend that Anderson, Jr. be insured under the NHIC policy.[11] *See e.g.* Depo. of Christine Anderson at pp.26 and 28; Depo. of Anderson, Sr. at p. 23. When Anderson, Jr. moved into the Braddock duplex in April 1999,[12] he maintained his own insurance policy on his own vehicle, an Acura.[13] Moreover, the Andersons did

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[9] In fact, according to Donna Reid Lunsford, Christine Anderson said that she was tired of supporting her son. Reid Affidavit.

[10] Donna Reid Lunsford claims to have seen Anderson, Jr. drive one of the Andersons' vehicles and Anderson, Jr. stated he drove his mother's vehicle approximately three times. Depo. of Anderson, Jr. at p.33. Assuming this is true, such evidence is insufficient, in light of the record before the Court to permit a jury to find that Anderson, Jr. was a resident of the Andersons' household.

[11] In fact, the first time Anderson, Jr. moved out of his parents' home when he was approximately 18 years old, Christine Anderson filled out paperwork with their automobile insurance company at that time to remove him from the policy because he was no longer living in their household. Depo. of Christine Anderson at pp.28 and 65.

[12] The NHIC policy became effective April 9, 1999, the same month that Anderson, Jr. moved into the duplex.

[13] Anderson subsequently relinquished possession of the Acura for failure to make his car payments, and his insurance lapsed for non-payment. This occurred before the accident.

not claim Anderson, Jr. as a dependant on their 1999 or 2000 Federal Tax Returns.

This Court is of the opinion that the nature of Anderson, Jr.'s visits to his parents' home and other contacts with them evidence strong bonds of kinship, but do not rise to the level of enjoyment of each part of the living facilities as contemplated by the *Broxsie* and other courts when determining residency in the insurance context. Likewise, the financial and other support that the Andersons provided does not rise to the level of sole support or dependency to establish that he or they had the present intention that he reside in their Belvedere home, but rather evidences the contrary intent by all parties that he maintain a separate residence apart from his parents at the Braddock Lane duplex. The financial and other support[14] he received from his parents in fact enabled Anderson, Jr. to continue to maintain his residence outside his parents' home and not become a consistent part of the community of the Andersons' Belvedere Lane home. Viewing all of the evidence in the light most favorable to the Defendants, the Court concludes that the financial support and contacts are best characterized as evidencing strong bonds of kinship, rather than any present intent to reside with

[14] In addition to the support the Court has described, such support could also include Christine Anderson doing Anderson, Jr.'s laundry, as claimed by Donna Reid Lunsford and disputed by other testimony, but that would not change the Court's conclusion.

his parents. The Court is of the opinion that on the record before the Court, a reasonable jury could only reach the conclusion that Anderson, Jr. was a visitor or transient with regard to the Andersons' household, and that he did not have significant additional attachments which would render him a consistent part of the household community as contemplated by *Broxsie*. Anderson, Jr. had not resided there with "no present intention of removing therefrom" (Broxsie at 597) for at least eight months prior to the accident, and neither he nor his parents had any present intent that he return to the Anderson household at the time of the accident.

Therefore, NHIC is entitled to a determination as a matter of law that Anderson, Jr. was not a resident of the named insured's household at the time of the January 5, 2000 accident, and as a result is not covered under the NHIC policy; and further, based on the foregoing, the Court will grant summary judgment as a matter of law in favor of the Plaintiff. Accordingly, it is

ORDERED AND ADJUDGED:

1. That Plaintiff's Motion for Summary Judgment (Doc.72) is granted and the Court determines that Jeffrey Bruce Anderson, Jr. was not a resident of the named insured's household at the time of the January 5, 2000 accident, and therefore is not covered under the NHIC policy; and

2. That entry of Final Judgment is hereby deferred pending Plaintiff's written notification to the

Court by February 26, 2007, regarding the status and proposed disposition of the case regarding the remaining three Defendants who have not appeared in this case: John P. Merlino, Jeffrey Bruce Anderson, Jr., and Juan Quiles, III.

DONE AND ORDERED this 7th day of February 2007.

/s/ Howell W. Melton
HOWELL W. MELTON
United States District Judge

Copies to:
Counsel of Record

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NEW HAMPSHIRE IN-
DEMNITY COMPANY, INC.,

Plaintiff,

vs.

DONNA REID, as Personal Representative of the Estate of Jonathan Merlino, deceased, HELEN KEARNS, as Personal Representative of the Estate of Eric Scott Kearns, deceased, JOHN P. MERLINO, JEFFREY BRUCE ANDERSON, JR., and JUAN QUILES, III,

Defendants.

CASE NO.:
3:05-CV-1280-J-12MCR

ORDER

(Filed Mar. 15, 2007)

On February 8, 2007, the Court entered an Opinion and Order (Doc.96) granting the Plaintiff's Motion for Summary Judgment (Doc.72). It is now,

ORDERED:

That the Clerk shall enter Final Judgment in favor of the Plaintiff and against the Defendants

Donna Reid, as Personal Representative of the Estate of Jonathan Merlino, deceased, and Helen Kearns, as Personal Representative of the Estate of Eric Scott Kearns, deceased, with costs to be assessed according to law, based on the Court's determination as a matter of law that Jeffrey Bruce Anderson, Jr. was not a resident of the named insured's household at the time of the January 5, 2000 accident, and as a result is not covered under the New Hampshire Indemnity Company policy.

DONE AND ORDERED this 14th day of March 2007.

/s/ Howell W. Melton
Senior United States
District Judge

Copies to:
Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NEW HAMPSHIRE INDEMNITY COMPANY, INC.,

Plaintiff,

-vs-

DONNA REID,

Defendant. /

Case No. 3:05-cv-1280-J-12MCR

JUDGMENT IN A CIVIL CASE

(Filed Mar. 16, 2007)

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to this Court's Order, entered on March 15, 2007, Judgment is entered in favor of the Plaintiff, New Hampshire Indemnity Co., Inc., and against the Defendants, Donna Reid, as Personal Representative of the Estate of Jonathan Merlino, deceased, and Helen Kearns, as Personal Representative of the Estate of Eric Scott Kearns, deceased, with costs to be assessed according to law, based on the Court's determination as a

matter of law that Jeffrey Bruce Anderson, Jr. Was not a resident of the named insured's household at the time of the January 5, 2000 accident, and as a result is not covered under the New Hampshire Indemnity Company policy.

Date: March 16, 2007

SHERYL L. LOESCH, CLERK

/s/ Patrick Divita
By: Deputy Clerk

Copy to:

Counsel of Record
Unrepresented Parties

APPENDIX D

United States Court of Appeals
For the Eleventh Circuit

No. 07-11731

District Court Docket No.
05-01280-CV-J-12-MCR

NEW HAMPSHIRE INDEMNITY COMPANY, INC.,

Plaintiff-Counter-Defendant-Appellee,

versus

DONNA REID,
as Personal Representative of the Estate of Jonathan Merlino, deceased,
HELEN KEARNS,
as Personal Representative of the Estate of Eric Scott Kearns, deceased,

Defendants-Counter-Claimants-Appellants.

JOHN P. MERLINO, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

(Filed Sep. 19, 2008)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: September 19, 2008
For the Court: Thomas K. Kahn, Clerk
By: Harper, Toni

ISSUED AS MANDATE
DEC 29 2008

U.S. COURT OF APPEALS
ATLANTA, GA.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-11731

D. C. Docket No.
05-01280-CV-J-12-MCR

NEW HAMPSHIRE INDEMNITY COMPANY, INC.,

Plaintiff-Counter-Defendant-Appellee,

versus

DONNA REID, as Personal Representative of the Estate of Jonathan Merlino, deceased, HELEN KEARNS, as Personal Representative of the Estate of Eric Scott Kearns, deceased,

Defendants-Counter-Claimants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(September 19, 2008)

Before ANDERSON, BARKETT and HILL, Circuit Judges.

PER CURIAM:

After oral argument and careful consideration, we conclude that the judgment of the district court is due to be affirmed. We have carefully reviewed the relevant Florida case law, and have compared the instant facts against the facts in those cases. We conclude that a reasonable jury would have to conclude under the facts of this case, and in light of the Florida case law, that Anderson, Jr. had moved out of his parents' home and was living apart in the duplex. The fact that he was receiving some financial support from his parents is not alone sufficient to make him a member of the family under the policy and the case law.

AFFIRMED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-11731-BB

NEW HAMPSHIRE INDEMNITY COMPANY, INC.,

Plaintiff-Counter-Defendant-Appellee,

versus

DONNA REID,
as Personal Representative of the Estate
of Jonathan Merlino, deceased,
HELEN KEARNS,
as Personal Representative of the Estate
of Eric Scott Kearns, deceased,

Defendants-Counter-Claimants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed Dec. 19, 2008)

BEFORE: ANDERSON, BARKETT and HILL, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellants is DENIED.

ENTERED FOR THE COURT:

/s/ Rosey Burkett
UNITED STATES CIRCUIT JUDGE

No. 08-1178

IN THE

Supreme Court of the United States

DONNA REID, as Personal Representative of the Estate of JONATHAN MERLINO, deceased, and HELEN KEARNS, as Personal Representative of the Estate of ERIC SCOTT KEARNS, deceased,

Petitioners,

v.

NEW HAMPSHIRE INDEMNITY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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I. FACTUAL ALLEGATIONS:

NHIC in its Opposition Brief cites to several factors that either are in dispute or otherwise are not dispositive.

For example, Jeffrey Bruce Anderson, Jr.'s parents, Jeffrey Bruce Anderson, Sr. and Christine Anderson (hereinafter "the Anderson's") lived at 87 Belvedere, Palm Coast, Florida. At the time of the accident Anderson Jr. lived at 25-B Braddock Lane, Palm Coast, Florida from April, 1999 until the January 5, 2000 accident. It is undisputed, however, that the Andersons owned both houses.

NHIC argues throughout its brief that Anderson Jr. did not have a "fixed dwelling unit" with his parents because they lived at two separate addresses. Parents and a child do not have to live at the same physical address in order to be considered part of the same household. (*See* Legal Authority, below, and Petition for Writ of Certiorari, pages 8, 9, and 10.)

NHIC contends that Anderson Jr. was independent and paying rent to his parents for living at 25B Braddock. There clearly is an issue of fact in this regard. Anderson Jr. testified that he paid his parents rent when he was employed. There is record evidence that Anderson Jr. had practically no employment or income between April 1999 and January, 2000. (*See* pages 5 and 6 of Petition for Writ of Certiorari for details.)

NHIC states that Anderson Jr. was consistently employed: based on record evidence, and that is not the

case. According to the Internal Revenue Service, Anderson Jr.'s reported income was: 1998 no income: 1999 $3,407.05; 2000 no income; and 2001 no income.

Anderson Jr.'s relationship with his parents can hardly be characterized as a landlord-tenant relationship. There was no written lease. Although he had agreed to pay rent, the record at the very least creates an issue of fact as to whether he actually did. Again, Anderson Jr.'s testimony was that he paid his parents rent when he had employment and was earning money: the record shows that Anderson Jr. had extremely minimal employment or income while living at 25B Braddock.

If Anderson Jr. was so intent on being completely independent from his parents, why did he not rent from a stranger? Rather, he lived in his parents' house because it amounts to free room and related support.

Moreover, the Andersons never threatened eviction when Anderson Jr. did not pay rent: rather, they told Anderson Jr. that he should straighten up and do something with your life. This tolerance of non-payment are the actions of a parent, not a landlord.

Anderson, Jr. testified that he is a typical 21-22 year old. If he made $200.00, he would usually spend it on the weekend, and then have to borrow it after he had spent it.

Anderson, Jr. had criminal problems that affected his ability to earn money to support himself and pay alleged rent to his parents. For example, the alleged

lawn maintenance job that he had in the Fall of 1999 was lost as a result of his arrest in Gainesville, Florida, for the attempt to distribute methamphetamine. NHIC references Anderson Jr.'s efforts to join the military in 1997 in order to show Anderson Jr.'s alleged independence. Anderson Jr. testified, however, that he was unable to join the military because he was arrested. Anderson Jr. was expelled from high school, although he did obtain his GED.

Clearly, Anderson family members were allowed privileges at 25B Braddock. The prior occupant at 25B Braddock was Lorraine Anderson, who was Anderson Sr.'s mother. Lorraine Anderson lived at 25B Braddock for about two year prior to Anderson Jr. Lorraine Anderson testified that sometimes she paid no rent, and other months she might pay $50.00 or $100.00. It was strictly voluntary.

Also to show Anderson Jr.'s independence, NHIC notes that Anderson Jr. received a $10,000.00 workers' compensation settlement. Anderson Jr. testified that he actually received $2,000.00 out of that settlement in December, 1999 (less than a month before the accident) and he did not repay his parents anything from it, whether it be for rent, loaned money, etc.

The record not only is in conflict as to whether Anderson Jr. paid any rent to his parents, but is undisputed that Christine Anderson gave her son cash in the Fall of 1999. Anderson Jr. said that his mother would give him $10.00 to $20.00 per week, which he used for necessities, like food, etc. NHIC argues that Anderson Jr. was responsible for his own grocery bills,

yet he had little to no income and was given money by his parents.

NHIC focuses on testimony that Anderson Jr. did not intend to live permanently at 87 Belvedere. What twenty-two-year-old intends to live in their parent's physical address for their entire life? There are numerous cases where the child did not have the intent to return permanently to live in their parent's primary residence, yet they were still part of their parent's household (*see Dwelle* and *Broxsie*, discussed below and in Petition for Writ of Certiorari).

Even though not a necessary element of proof, the record shows that Anderson Jr. was very involved with his parent's home at 87 Belvedere. For example, Anderson Sr. had suffered a stroke, and Anderson Jr. therefore had to help with maintenance work at 87 Belvedere. Donna Lunsford was at 87 Belvedere at least four times a week in the relevant time frame, and she recalled that Anderson Jr. was present ninety percent of the time. While there, he enjoyed the premises by swimming in the pool, eating, watching television, etc.

NHIC argues that Anderson Jr. would go weeks at a time without visiting his parent's house, but that statement is in conflict with the record.

All the parties agreed that Anderson Jr. could walk into the house at 87 Belvedere without knocking, and was free to avail himself of any food in the kitchen. Anderson Jr. kept old clothes at 87 Belvedere, and kept a basket of old toys there as well. Donna Lunsford one time saw Christine Anderson attempting to clean the

garage, and Christine Anderson was complaining that she could not do so because of boxes of Anderson Jr.'s belongings that were in the garage at 87 Belvedere.

There also was a question about whether Anderson Jr. had a key to his parent's house. Anderson Jr.'s sister, Nicole Rodriguez, testified that all the kids had keys to the house on Belvedere, and that she assumed Anderson Jr also did.

Anderson Jr., however, did not need a key. Anderson Sr. was always home as a result of his stroke, and therefore Anderson Jr. had free access to the house without having to use a key to gain entry.

NHIC contends that Anderson Jr. did not have permission to drive his parent's automobiles, yet Donna Lunsford saw him driving Christine Anderson's vehicle.

The record shows that Christine Anderson performed Anderson Jr.'s laundry while he lived at 25B Braddock. There also is record evidence that Anderson Jr. still had 87 Belvedere used as an address, which was listed as Anderson Jr. address on the ambulance report from the subject accident.

Christine Anderson paid $10,000.00 for bond when Anderson Jr. was arrested for amphetamine in December, 1999. Anderson Jr. never repaid any of that money.

It is not disputed that after the subject accident of January 5, 2000, Anderson Jr. returned to his parent's house. Christine Anderson testified that her son stayed

there about six days after leaving the hospital, after which he returned to 25B Braddock (as soon as he was physically able). The record evidence, however, contradicts her statement. Roommate Juan Quiles testified that Anderson Jr. never returned to 25B Braddock after the motor vehicle accident, but rather stayed at his mother's house. Even though Anderson Jr. was able to return to 25B Braddock, he did not do so upon leaving the hospital or after. (Note that Quiles stayed at 25B Braddock until roughly May, 2000.)

Christine Anderson (Anderson Jr.'s mother) was a hostile witness. She testified that she was afraid that NHIC would sue her if the Court ruled that there was coverage for her son under the NHIC policy. Her testimony was contradicted numerous time in the record, such as her statement that Anderson Jr. was always employed and that he paid his rent for the use of 25B Braddock.

NHIC also addresses the relationship between Anderson Jr. and his parents prior to moving into 25B Braddock in April, 1999. (The 11th Circuit Court of Appeal's decision focuses on Anderson Jr.'s departure from 87 Belvedere to 25B Braddock in April 1999 as terminating the"household" relationship with his parents. As such, these facts were of less impact, and are addressed on page 4 of the Petition for Writ of Certiorari.)

Christine Anderson characterized 87 Belvedere as a "revolving door" for Anderson Jr.; that he moved around all the time, that he is a kid. He also was under house arrest at 87 Belvedere in 1996 and 1997.

II. LEGAL AUTHORITY:

NHIC argues that Anderson Jr. did not live at the same physical address as his parents. Florida law is very clear that children do not have to live in the same physical address as their parents to still be a member of their parents' household. (*See* pages 8, 9, and 10 of Petition for Writ of Certiorari.)

It is well recognized that children in college often are considered residents of their parents' households, even though they no longer physically live in their parent's house. (*See, e.g., General Guarantee Insurance v. Broxie*, 239 So.2d 595 (Fla. 1st DCA 1970) and *Seitlin v. Phoenix Insurance*, 650 So.2d 624 (Fla. 3rd DCA 1995).) By analogy, it is as if The Andersons owned the dormitory where Anderson, Jr. was living at the time of the accident. As Anderson himself said, he and his roommates were like college kids, just no college.

Both parties cite to *Row v. United Services Automobile Association*, 474 So.2d 348 (Fla. 1st DCA 1985) (briefed in the original Petition for Certiorari). NHIC argues that Mark Row had mental problems that affected his ability to work. Jeff Anderson, Jr. is not alleged to have a similar mental problem, but his criminal history certainly affected his ability to earn money, support himself, and pay rent to his parents while living at 25 Braddock. Anderson Jr.'s arrest for distributing methamphetemine in September, 1999 made it extremely difficult to find work. He was unable to join the Army because of another arrest. His tax returns also show that he had very little income.

Similar to Mark Row, there is record evidence that Anderson Jr. did not pay his parents rent, but rather lived for free in a house that they owned. There is also evidence that Anderson Jr. earned very little money, and in fact, was given his allowance for necessities directly from his parents. His tax returns show that Anderson Jr. earned $3,407.05 in the four years from 1998 to 2001. This level of dependence and documented lack of earning certainly supports the finding that Anderson Jr. was a member of his parent's household.

The fact that 87 Belvedere was .9 miles away from 25 Braddock is immaterial. Just like in *Row*, Anderson Jr.'s parents owned 25Braddock and supported their son while he lived there, including not paying rent.

Mark Row also left his father's apartment for about seven months a year and a half before the accident. Row went for two months to Louisiana looking for work, and Anderson Jr. went to Massachusetts for two months. Also, Mark Row had a female roommate who paid the utility bill for six months, so Mark Row's living expenses were not paid entirely by his father.

NHIC focuses heavily on the *Broxsie* opinion. The *Broxsie* opinion, however, supports a finding of coverage in the case at bar. In that case, Ms. Broxsie originally lived with the her aunt, the named insured, in Monticello, Florida. Ms. Broxsie attended school in Thomasville, Georgia, and about a year before the subject accident, began living in a rented room in Thomasville. She testified that upon graduation it was her *intent to accept employment in Thomasville, and not return to live with her Aunt* . The trial court ruled that *as a matter* of law,

Ms. Broxsie was a resident of her Aunt's household for insurance purposes, even though she had not lived in the same physical address for over one year. The District Court affirmed.

NHIC has argued that the Anderson's did not intend for Anderson Jr. to be an insured under their policy. The intent does not control whether a person is a member of their parent's "household". "In entering judgment for State Farm, we conclude that the lower court too narrowly focused on Dwelle's statement, where he intended to reside in the future, and not upon the salient facts." *Dwelle v. State Farm*, 839 So. 2d 897 (Fla. 1st DCA 2003).

In *Dwelle*, Scott Dwelle was a college student who lived with his parents and at college. On the day of the accident, he had just married and was on his way to his honeymoon, after which his *intent* was to move in permanently with his wife in her apartment. The appellate court reversed the trial court's Summary Judgment for State Farm with directions to enter judgment in favor of Dwelle, noting that the trial court had overly emphasized Dwelle's future intent.

Concerning the intent, NHIC has cited a case arising out of a divorce lawsuit from 1941, *Kiplinger v. Kiplinger*, 2 So. 2d 870 (Fla. 1941). Although *Kiplinger* may be cited in Florida Appellate Opinions regarding "resident relative", the *Kiplinger* intent language is not deemed to be conclusive, or even particularly persuasive, in the opinions that actually deal with insurance policy interpretation. Divorce actions do not have the same rules of construction as an insurance

policy, to whit: insurance policy language is interpreted broadly, and any ambiguity is construed in favor of coverage. (*See, e.g., Blue Cross and Blue Shield of Florida v. Steck*, 778 So. 2d 374 (Fla. 2nd DCA 2001; *State Farm Fire and Casualty v. CTC Development Corp.*, 702 So. 2d 1072 (Fla. 1998).)

NHIC cites in Footnote 8, the case of *Whitten v. All State Insurance*, 476 So. 2d, 794 (Fla. 1st DCA 1995). That case involved the finding of no coverage for the insured's son when he was physically residing with his mother for three months prior to the accident. A review of the facts, however, show that Whitten had resided in Indiana with his wife for five years prior to living in his mother's house for three months before the accident. The court ruled that he was not a resident of his mother's household because he was collecting unemployment compensation from Indiana, he maintained his bank accounts in Indiana, his driver's license was in Indiana, and otherwise showed no intent of changing his clear Indiana residency. Moreover, the policy in *Whitten* defined "resident" or "reside in" as referring to "the physical presence in the named insured's household with the intent to continue to live there". *Whitten*, at 795. NHIC's policy is far less restrictive.

NHIC cites *Griffin v. General Guaranty Insurance*, 254 So. 2d 574 (Fla. 3rd DCA 1971). In that case, the court ruled that there is no coverage for an uncle under his nephew's policy, even though he had resided three or four days a week with the nephew, but also maintained his residence with his mother and step-father in another domicile. This finding was reached by

the trial judge *as a trier of fact.* It was not a summary judgment. The Appellate Court upheld the decision because the trial court's conclusion is presumed to be correct, and "will not be reversed unless there is a demonstration that there was a complete lack of sufficient, competent evidence to support the findings of the trial judge." *Id.* By contrast, the case at bar is a DeNovo review, and any conflicting testimony must be taken in the most favorable light to the non-moving party.

NHIC also cites to *Seitlin & Co. v. Phoenix Insurance Co.*, 657 So. 2d 624, (Fla 3rd DCA 1994). In that case, a law student was a "resident" of his parent's household, even though the student had his own apartment and had no intention of returning to his parent's house to live after he graduated. In that particular instance, the college student maintained a bedroom and possessions at his parent's house. *Seitlin* involves a finding that there was coverage without an intent of returning to the parent's household. Even though in that instance the student maintained a bedroom in his parent's house, that was merely evidence that weighed in favor of coverage. The 3rd DCA in *Seitlin* did not rule that it was an indispensable requirement, but rather considered it a relevant point in the balance.

NHIC also has cited it to *Kepple v. Aetna Casualty and Surety*, 634 So.2d 220 (Fla. 2d DCA 1994); *Alava v. All State Insurance*, 497 So.2d 1286 (Fla. 3rd DCA 1986); and *Southerland v. Glens Falls Insurance*, 493 So.2d 87 (Fla. 4th DCA 1986). These cases involved findings that there was coverage. They are only minimally persuasive in the case at bar because these opinions do

not indicate whether there is coverage under our facts. They merely assess the factual matters in those cases and find that there was coverage: they do not negate coverage in the case at bar.

III. SUPREME COURT JURISDICTION:

The Trial Court's Summary Judgment and Appellate Court's decision contravene Rule 56 and disregard controlling State Court decisions. The Courts disregarded facts in the record that weighed in favor of coverage. (*See* original Petition for Certiorari for in depth argument on this point.)

Respectfully submitted,

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